No. 732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

JAMES R. HOFFA, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause on July 29, 1965.

OPINION BELOW

The opinion of the Court of Appeals is reported at 349 F. 2d 20, and is printed as Appendix A, *infra.*

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*) was entered on July 29, 1965. A timely Petition for Rehearing was denied on October 7, 1965. On October 18, 1965, Mr. Justice Stewart extended the time for the filing of a petition for a writ of certiorari for an additional 30 days to December 6, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence obtained by the Government by means of deceptively placing a secret informer in the quarters and councils of a defendant during one criminal trial so violates the defendant's Fourth, Fifth and Sixth Amendment rights that suppression of such evidence is required in a subsequent trial of the same defendant on a different charge.

2. Whether petitioner was denied a fair and impartial trial as guaranteed by the Fifth and Sixth Amendments by reason of:

(a) the Court's refusal to postpone the trial in Chattanooga because of continuous prejudicial publicity, even though the same Court, three weeks earlier, had found in Nashville that substantially identical publicity made fair trial for petitioner impossible there.

(b) the prejudicial effect upon the jury of the Government's constant guarding of the jury and Government witnesses by an extraordinary number of Marshals.

3. Whether petitioner was denied a fair trial because admitted Government surveillance conducted prior to

and during trial engendered such fear in petitioner and his counsel as to deny him effective assistance of counsel and to impair his right of private consultation with counsel.

4. Whether petitioner was deprived of a fair trial by the erroneous admission and retention of highly prejudicial evidence, including a transcript of a trial judge's statements in a former prosecution against petitioner, in support of the counts on which petitioner was convicted and without according him his constitutional rights of confrontation and cross-examination.

5. Whether the indictment of petitioner was invalid by reason of:

(a) the delegation of the Jury Commission's duties of grand jury selection to non-official "suggestors" (consisting primarily of bankers, Postmasters and State Court officials, and not including any wage earner, manual laborer or representative of organized labor) and the Jury Commission's blanket acceptance of the persons supplied by the "suggestors" without any investigation or examination by the Jury Commission to determine whether such persons were qualified or constituted a cross-section of the community;

(b) the trial court's refusal to grant petitioner a hearing to prove improper delegation of the duties of the Jury Commission in selecting the grand jury, and the systematic exclusion of elements of the community from the grand jury venire; and

(c) the failure of the Court in voir dire examination to inquire whether the members of the Grand Jury panel were biased against petitioner because of preju-

dicial publicity against him relating to the impending Grand Jury investigation.

6. Whether a Government agent's hearsay testimony of the alleged knowledge of a grand jury witness, who refuses to testify on the claim of Fifth Amendment privilege, constitutes probable cause for indictment.

7. Whether an accused is deprived of a fair trial:

(a) When jury instructions to apply the law of conspiracy are repeatedly given throughout a trial from which the conspiracy count has been severed on a judicial finding of prejudice; and

(b) When the trial judge abandons to the jury his function of determining the existence of *aliunde* evidence of conspiracy in admitting the declarations of alleged co-conspirators against a non-present alleged conspirator.

8. Whether an accused is deprived of a fair trial by the prosecutor's statements in final argument to the jury:

(a) That the accused's consultation with counsel and participation in his own trial indicates his guilt; and

(b) That the prosecutor personally believes the accused to be guilty.

The foregoing questions are discussed in this petition as reasons for granting the writ. On the questions which follow, petitioner adopts such reasons for granting the writ as may be advanced by co-petitioners Campbell, Parks and King; and if the writ be granted without limitation the petitioner reserves argument on the merits of such questions.

9. Whether it was prejudicial error to deny severance for trial of the four substantive counts either prior to or during the trial.

10. Whether the indictment was insufficient because it charged petitioner with aiding and abetting, without stating in any way how, where or through whom he aided and abetted.

11. Whether the court committed prejudicial error in refusing to disclose to the defense for impeachment purposes the Grand Jury testimony of the key Government witness.

12. Whether, in the circumstances of the trial in this case, there was prejudicial error in limiting the cross-examination and impeachment of the chief Government witness, Partin, including

(a) the denial of an opportunity to cross-examine Partin with respect to recordings of telephone conversations with petitioner,

(b) the refusal to permit the witness, Reynolds, to testify that Partin had attempted to suborn his testimony in confirmation of Partin's testimony, and

(c) the exclusion of the testimony of Mrs. Partin, who had been subpoenaed by the defense.

13. Whether the evidence was sufficient to sustain the conviction.

14. Whether the trial court committed prejudicial error:

(a) in overruling motions for mistrial and to strike the testimony of Government interviewed witnesses, where F.B.I. agents had deliberately destroyed their original notes of interviews with such witnesses;

(b) in refusing to order production of a Government agent's notes on an informer Government witness's reports to such agent; and

(c) in refusing to order production of Government reports for the purpose of determining what Government evidence was the fruit of the interception and recording of telephone conversations between petitioner and Government informer Partin.

15. Whether the trial court committed prejudicial error in denying a hearing to determine whether or not the petit jury was chosen in such a manner as to exclude cognizable elements of the community.

16. Whether there was prejudicial error in the trial court's refusal to declare a mistrial because of:

(a) the prosecutor's cross-examination of a co-defendant concerning said co-defendant's invoking the Fifth Amendment privilege in a prior and connected proceeding;

(b) the prosecutor's cross-examination of petitioner as to whether he had told said co-defendant to invoke the Fifth Amendment privilege; and

(c) the prosecutor's statement in final argument to the jury that the co-defendant had invoked the Fifth Amendment privilege.

17. Whether the trial court committed prejudicial error in refusing to give a cautionary instruction as to the testimony of informer Partin and instructing that a witness is presumed to testify truthfully.

18. Whether the testimony of Government witness Partin should have been suppressed on the ground that it was paid for by the Government in violation of 18 U.S.C. 201(h).

STATUTES INVOLVED

1. Section 1503, Title 18, U.S.C. provides in pertinent part:

> "Whoever corruptly * * * endeavors to influence, intimidate, or impede any * * * petit juror * * * in the discharge of his duty * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both."

2. Section 2, Title 18, U.S.C., provides in pertinent part:

> "Whoever * * * aids, abets, counsels, commands, induces, or procures [the commission of an offense against the United States] is punishable as a principal."

STATEMENT

From October 22 to December 23, 1962, petitioner was tried in Federal court at Nashville, Tennessee on a charge of violating the Taft-Hartley Act (II D.A. 584a-590a).[1] The trial ended with a hung jury (II D.A. 591a). During the course of the trial venireman Tippens and jurors Paschal and Fields were excused (II D.A. 589a; IV D.A. 1963a). That case is referred to herein as the Test Fleet case.

On May 9, 1963, petitioner was charged in a five count indictment, alleging in Count I a conspiracy with the defendants named in the substantive counts to influence petit jurors Tippens, Fields and Paschal and other unnamed jurors in the Test Fleet case; and in

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[1] "D.A." references are to Appellants' Joint Appendix as printed for the Court of Appeals. "G.A." references are to the Government's Appendix as printed for the Court of Appeals. "Tr." references are to the typewritten manuscript of the trial proceedings in this case, which transcript is on file with the Court.

Counts II, III, and V, respectively, with aiding and abetting defendants Medlin, Parks and King to influence, respectively, jurors Tippens, Fields and Paschal (I D.A. 66a-71a).[2] Count IV charged petitioner with aiding and abetting defendant Tweel in contacting one Dallas Hall to induce him to communicate with jurors to influence their decision.

Count I was severed for trial (I D.A. 15a, 199a). The case was tried at Chattanooga, Tennessee, on the substantive counts only. Petitioner was convicted on Counts III and V (VII D.A. 3291a-3293a), and sentenced to consecutive terms of imprisonment of four years and a fine of $5,000 on each count (VII D.A. 3567a-3570a). The following facts are set forth and grouped in the same order as the corresponding reasons for granting the writ to which they are pertinent.

1. Deprivation of Fair Trial—by use of evidence obtained surreptitiously through the planting of a secret informer in the quarters and councils of the petitioner in an earlier trial—all in violation of the Fourth, Fifth and Sixth Amendments.

Edward Grady Partin, a convicted felon, was the sole witness who connected petitioner with the offenses charged in this proceeding. In late September, 1962, Partin, a Teamster official in Baton Rouge, Louisiana (III D.A. 1175a-1176a), was in jail in Baton Rouge on a charge of kidnapping (VI D.A. 2687a, 2697a). He was then under a 26-count indictment in Federal court for embezzlement of union funds (VI D.A. 2696a); and under State indictments for manslaughter, perjury, and assault (VI D.A. 2696a,

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[2] Defendant Campbell was also charged as an aider and abettor in Count III.

2697a, 2694a). At that time (IV D.A. 2037a) Partin, who disliked petitioner (IV D.A. 1582a), contacted the Parish District Attorney, Sargent Pitcher, and his assistant, William Daniels (VI D.A. 2685a). Partin told them a story of an alleged plot by petitioner to assassinate then Attorney General Robert Kennedy (III D.A. 1540a).

A conference was arranged at two or three o'clock in the morning on October 2nd among Pitcher, Daniels, Partin, Assistant United States Attorney Peter Duffy, and United States Department of Justice attorney Frank Grimsley (IV D.A. 2040a, 2041a, 2042a; V D.A. 2392a). Grimsley's immediate superior was one Walter Sheridan, a non-lawyer special consultant to the Attorney General, who was in charge of the prosecution of petitioner in the Test Fleet case (III D.A. 1291a, 1293a; V D.A. 2430a). This conference was pursuant to Sheridan's instructions; and Grimsley reported its results to Sheridan (III D.A. 1295a; VI D.A. 2982a).

Following the conference, Partin was released on bail on October 5th on Pitcher's recommendation. He went to a motel where he remained for three or four days conferring with Daniels (IV D.A. 2043a). On October 8th, from the motel, Partin in the presence of Daniels, called petitioner long distance. The conversation was recorded under instructions of Daniels (IV D.A. 2046a-2047a).

Partin asked petitioner if he could meet with him and talk over some of Partin's problems:

> "Partin: . . . I got a bonding company and all. What I was thinking, Jimmy, after I get this thing straightened out today and tomorrow and

everything if you get an opportunity or something I would like to get with you and talk with you and talk this thing out.

"Hoffa: Well, I'll be here all week." (Ex. 215; VI D.A. 2822a).

Not later than that day, Partin became a Justice Department informer (V D.A. 2427a-2428a). Within two days the recording of this telephone conversation was delivered to the Federal Government (IV D.A. 2056a-2057a). The Test Fleet trial was to start in Nashville on October 22nd. Partin agreed to go there for the Government. Accordingly, from the motel, on October 18th, Partin again called petitioner long distance and invited himself to Nashville (Ex. 216; VI D.A. 2826a). Daniels recorded the conversation and reported it to Grimsley on the same day (IV D.A. 2059a, 2061a).

On October 20th and 21st Partin met with Grimsley in Atlanta where he was given his instructions and Sheridan's telephone number in Nashville. (IV D.A. 2063a-2064a, 2068a-2069a; VI D.A. 3069a).

Partin arrived in Nashville on the 22nd, the opening day of the Test Fleet trial, and immediately talked with Sheridan (III D.A. 1178a, 1179a, 1208a). While in Nashville during most of the trial, he reported to Sheridan on a daily basis (III D.A. 1298a; IV D.A. 1767a). Partin's meetings with Sheridan were always in an automobile, except once in a theatre lobby (III D.A. 1302a).

Grimsley had instructed Partin to "keep his eyes and ears open" and "if he heard anything of interest to call Sheridan" (VI D.A. 2995a).

Sheridan in turn, did not specifically advise Partin what information he wanted and relied on Partin's judgment (III D.A. 1297a-1298a). According to Grimsley and Sheridan, Partin was told to get information of jury tampering and any other illegal activities (III D.A. 1187a, 1202a), but no specific limitation on what kind of information he should pass to Sheridan was ever given him (III D.A. 1297a). Partin himself, who had the equivalent of a tenth grade education, did not attempt to judge what would be evidence of jury tampering (III D.A. 1504a; IV D.A. 1709a), and reported to Sheridan "anything that I would have seen." (IV D.A. 1767a).

The Government offered no evidence that at the time of Partin's retention as an informer there were any grounds to believe that petitioner would engage in jury tampering or any other illegal activities.

Six attorneys who had participated in petitioner's defense in the Test Fleet trial testified, without contradiction, as follows (III D.A. 1228a, 1253a-1291a, 1331a-1341a): On a daily basis Partin attended the trial; went to and from the courthouse with petitioner and/or his counsel and ate with petitioner and/or his counsel; throughout the trial, Partin had access to the defense councils and was present with petitioner and his counsel even when the trial was being discussed. For example, an attorney of record for the petitioner interviewed a number of truck drivers the day before they were to testify for the defense. Partin was present during the interviews, which were stenographically transcribed and given to the witnesses for possible corrections. Partin helped assemble the transcribed questions and answers (III D.A. 1257a-1263a). Sheridan admitted that Partin had told him about the questions

and answers and that counsel had been going over them with the drivers (III D.A. 1314a). Prosecutor Neal at the Test Fleet trial asked one of the drivers:

> "'Q. Did [defense counsel] give you anything to read, Mr. Sammut?
>
> "'A. No, sir, not even a newspaper.
>
> "'Q. Not even a newspaper? I am not talking about newspapers, I am talking with respect to your testimony. Did they give you anything to read with respect to your testimony?
>
> "'A. After I talked to them.
>
> "'Q. They gave you written questions and answers, didn't they?
>
> "'A. The questions that they asked me and the questions that I answered'" (III D.A. 1344a).

On another occasion the prosecution rose to object to a question before the defense counsel could state it, other than referring to a date. When defense counsel asked: "Have you been listening to our conversations? How would you know what I am going to ask this witness?", the prosecutor replied: "I am psychic" (III D.A. 1259a, 1342a-1343a).

Partin discussed the selection of the Test Fleet jury with petitioner and heard counsel discuss it (III D.A. 1217a, 1270a). He heard one of petitioner's counsel criticizing other defense counsel as to what they were doing wrong in the case, and what should be done in correction (III D.A. 1282a, 1240a). He took defense exhibits to the printer (III D.A. 1260a). He was present when the questions prepared for jury voir dire were distributed among counsel (III D.A. 1332a). He interrogated one of defense counsel on an important

aspect of prospective defense trial strategy, and separately interrogated each of two defense counsel on another such important aspect (III D.A. 1336a). As defense counsel met each evening to discuss and prepare for the next day's witnesses, Partin was frequently present, or in and out of the room as door keeper (III D.A. 1230a, 1260a, 1274a-1275a, 1281a, 1286a, 1337a-1338a).

Sheridan admitted that Partin, in his daily reporting, gave him information: (1) on trial matters concerning the defense, including comments by petitioner's counsel and interviews of defense witnesses by petitioner's counsel, but only "occasionally"; (2) on the comings and goings of people to and from defense headquarters; (3) on defense activities adjudged "unethical" by Sheridan, but not known to him to be illegal because "I am not a lawyer"; and (4) on other matters "related just generally to the trial" which he thought "very minimal" (III D.A. 1298a, 1300a, 1304a, 1314a).

Sheridan passed the information on to the Government trial attorneys (III D.A. 1301a-1302a, 1314a), and on a daily basis to the FBI (III D.A. 1322a). The action of the trial court in sustaining Government objections to disclosure of the nature of the information transmitted by Partin thwarted the defense's attempts to find out further details as to the information passed (III D.A. 1208a-1209a, 1215a-1218a, 1223a).

Partin denied he was ever paid anything by the Government (III D.A. 1219a). Sheridan denied that he ever authorized any payments to Partin and stated that no promises were made to him (III D.A. 1308a).

At the time of the Test Fleet trial and the instant trial Partin was under a 26-count Federal indictment for embezzlement of union funds (VI D.A. 2696a, 2829a). Grimsley was assigned to its prosecution (VI D.A. 2639a).

Partin's motion for a continuance of the Federal charge on September 21, 1962, was opposed by the Government. On October 4, 1962, two days after his meeting with Grimsley, the case was continued on motion of the Government. Shortly after the conclusion of the Test Fleet case, the embezzlement case was adjourned without date and had not been brought to trial at the time of Partin's testimony in this proceeding (IV D.A. 2623a, 2642a-2643a, 2829a, 2932a).[3] Further, local Internal Revenue Service agents received orders not to press a Federal tax claim against Partin (V D.A. 2506a).

The State kidnapping charge was first indefinitely continued on November 12, 1962; and then dismissed by Pitcher (VI D.A. 2691a-2693a). The State perjury charge was dismissed by Pitcher (VI D.A. 2695a). The State manslaughter charge has not been brought to trial (III D.A. 1571a, 1572a).

On direct examination, Partin stated that he had been paid by the Government for traveling "expenses" only. These payments, he said, were made to his wife (III D.A. 1465a-1466a). But on cross-examination he denied that the payments to his wife were for travel expenses (IV D.A. 1768a, 1769a, 1801a).

Partin was under a court order to pay his wife $300 a month for the support of his children (IV D.A. 1851a).

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[3] Indeed, as of this date, this embezzlement indictment, returned in June, 1962, has not been brought to trial by the Government.

Sheridan and Grimsley knew of this order (IV D.A. 1848a-1849a, 1862a, 1863a, 1793a). The Government sent Partin's wife $300 a month. It was Partin's understanding that these payments were made by the Government as a result of his conversations with Grimsley and Sheridan (IV D.A. 1794a).

From July, 1963, through October, 1963, Grimsley sent Mrs. Partin $300 per month by cashier's checks (IV D.A. 1768a-1772a; V D.A. 2420a-2429a). Grimsley had obtained the money from a Department of Justice confidential fund (V D.A. 2420a-2429a), and effectively hid the payments.

Grimsley first claimed that these regular payments were for Partin's expenses (V D.A. 2440a); and on the eve of the instant trial in January, 1964 (V D.A. 2458a), he drew up an expense sheet (Ex. 154) in an attempt to justify the payments as expenses (V D.A. 2448a-2450a).

The memorandum, dated July 3, 1963,[4] from Sheridan to the Administrative Assistant Attorney General (Ex. 154), which authorized the payments to Partin, stated that "in connection with the forthcoming trial * * * it is requested that a check in the amount of $300.00 be drawn against the confidential fund beginning July 8 made payable to 'A. Frank Grimsley' and that a check be drawn each month through November, 1963 * * *." No reference was made to expenses. Grimsley finally admitted that the monthly payments of $300 made through him to Partin's wife were for the support of Partin's children and not for Partin's expenses (V D.A. 2446a).

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[4] The Government was pressing for trial of the instant case; and on July 29, 1963, it was set for trial on October 14, 1964 (I D.A. 16a).

Even after the conclusion of the Test Fleet trial, Partin continued to play his role as informer for the Government and continued to seek information from petitioner's counsel. To this end, after receiving a subpoena to appear before the Grand Jury which returned the instant indictment, he sought out petitioner's counsel and allegedly obtained an admission of defense advice to witnesses generally to claim the Fifth Amendment privilege before said Grand Jury. He relayed this information to Sheridan as he had done throughout the trial (IV D.A. 1830a-1844a).

It was in the course of his foregoing activities as a secret Government informer, operating in the midst of defense councils and counsel, that Partin obtained the alleged incriminatory statements from petitioner which convicted him in this proceeding.[5]

The trial Court denied petitioner's motion to suppress Partin's testimony. The Court of Appeals affirmed. It saw in the use of Partin's testimony no interference with petitioner's right to counsel, no denial of fair trial, no denial of due process, and no unlawful search and seizure.

As to the Government's payments to Partin's wife, the Court of Appeals found, there was "no evidence that Partin received money from the Government except for expenses which he incurred sometime after the [Test Fleet] trial" (Appendix A, *infra*, p. 55a).

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[5] Petitioner testified at the trial and denied having made the incriminatory statements attributed to him by Partin. (VI D.A. 2711 et seq).

2. Deprivation of Fair Trial—by prejudicial publicity, and heavy guard of Marshals attending upon jury.

(a) *Prejudicial Publicity.* It is too well known to require proof that petitioner has been the object of extensive adverse publicity for several years, much of it emanating from the Department of Justice. When petitioner was indicted in May 1962, in Nashville, Tennessee, he became for that State an object of unusually extensive publicity which, because of subsequent developments, continued down to the instant trial.

Petitioner's trial was first scheduled to be held in Nashville in the Middle District of Tennessee. Petitioner on December 11, 1963, moved for a transfer to another district or for other appropriate relief because adverse publicity so prejudiced him as to make a fair and impartial trial impossible (I D.A. 17a). In support of the motion, petitioner made a showing of prejudicial publicity, some of it stemming directly from the Government's instigation.

On May 9, 1963, simultaneously with the return of this indictment, the Department of Justice gave the press a summary of all criminal actions brought against the petitioner by the Government up to that time. Nothing in this summary concerned this case (I D.A. 66a). The summary was widely published in the Middle District of Tennessee. (Appendix E-1, *infra,* p. 75a; petitioner's motion, filed December 11, 1963, Exhibits H and I).

Another press release was issued by the Department in June, 1963. This announced the indictment of petitioner on a criminal charge in Chicago, unrelated to the charges in this proceeding. It resulted in the publication within the trial District of further stories, not

only on the Chicago charge, but also on other unrelated charges against petitioner. (Appendix E-2, *infra,* p. 76a; Exhibits J and K, filed December 11, 1963).

A third Department of Justice release followed. This informed the public of the District of the Department's placement of a witness in this case under protective custody because, in the Department's opinion, he was subject to threats of harm. (Id., Exhibit L).

Additionally, starting in December, 1961, and continuously thereafter, a consistent stream of publicity was directed against petitioner by the information media of the District. Much of this stream, including the running of adverse headlines, biased editorials, and graphic but prejudicial cartoons, could not reasonably be called fair comment.

At the close of the Test Fleet case, Judge Miller, who had presided, announced he had signed an order to convene a special Grand Jury because evidence had already been presented to him indicating illegal attempts by petitioner's close labor union associates to influence certain members of the jury. This statement was reiterated in publications within the District together with the fact that petitioner's co-defendant, King, "took the Fifth Amendment" before Judge Miller. (Id., Exhibit M). In convening the Grand Jury, Judge Gray noted that petitioner's trial had been "highly publicized" (I D.A. 204a).

On November 20, 1963, the same District Court filed its findings in support of the disbarment of Z. T. Osborn, Jr., who was co-counsel for petitioner in this proceeding. The disbarment was based on an alleged

effort to tamper with a prospective juror in this proceeding. Starting several hours before such filing, and continuing on many days thereafter, published items on the Osborn disbarment increased the flow of publicity adverse to petitioner. The items associated Osborn with petitioner. The reconvening of petitioner's Grand Jury for the purpose of investigating the charge of jury tampering by Osborn, the calling by the reconvened Grand Jury of three jurors who had served in the Test Fleet case, and the indictment of Osborn on a charge of jury tampering—all during December, 1963, the month before petitioner's trial, were widely publicized. (Id., Exhibit B, C, and N filed December 11, 1963).

On December 31, 1963, Judge Wilson transferred the proceedings against petitioner and the other defendants from Nashville to Chattanooga, Tennessee—trial to start, without postponement, on January 20, 1964. In doing so, Judge Wilson found (I D.A. 214a-215a):

> "A review of the nature and extent of the publicity within the territorial extent of the United States District Court for the Middle District of Tennessee discloses that during the period since the indictment of these defendants and *particularly during the period since November 18, 1963, the date upon which an order was entered setting this case for trial upon January 6, 1964, the publicity has been quite intense.* An impartial review of this publicity can only lead to the conclusion that it has been prejudicial to each of the defendants herein with respect to the matters upon which he here stands for trial . . ." (Emphasis supplied).

To Judge Wilson at the time it was "apparent" that (I D.A. 216a):

> ". . . a jury panel representative of a fair cross section of the District could not be drawn at this particular time without a large percentage of them *having been recently exposed to intensive publicity* reasonably expected to influence them in their attitudes toward these defendants with regard to the particular charges on which the defendants here stand for trial." (Emphasis supplied).

Judge Wilson observed further (I D.A. 216a):

> ". . . Even though a nominally impartial panel should be selected, in view of the nature and extent of the publicity here involved, the case might proceed under the cloud of possible error."

And Judge Wilson concluded as to the facts and law (I D.A. 216a):

> ". . . In safeguarding the right to a fair trial the appellate courts have reversed the trial courts for a denial of a change of venue, or in the alternate a postponement where publicity has been of a somewhat similar nature and extent to that here encountered. See *Irvin* v. *Dowd,* 366 U.S. 717; *Delaney* v. *U.S.,* 199 F. 2d 107; *Briggs* v. *U.S.,* 221 F. 2d 636."

Thirteen days later, on January 13, 1964, petitioner moved for continuance of his trial from January 20, 1964, or for other relief as might be required. He alleged a "saturation of prejudicial publicity" in the Chattanooga area "particularly within the months of November and December, 1963, and the early part of January, 1964, . . ." much of which was "deliberately engendered by public statements and acts of various officials in the Justice Department and other persons

acting in concert with them," and that he was "unable to have a fair trial in this district . . . at this time." (I D.A. 218a-220a). Petitioner offered to prove these allegations at a requested hearing. (I D.A. 220a).

In support of his motion, petitioner showed the following as examples of the prejudicial publicity generated against him in Chattanooga. The only two daily Chattanooga papers from May, 1962, to November, 1963, published some 200 articles associating petitioner with various prejudicial matters. On November 21, 1963, these papers published front-page stories on the disbarment of petitioner's co-counsel Osborn for an alleged attempt to bribe a juror in the coming trial. The stories further stated that Osborn had attempted to influence jurors in the Test Fleet trial. The Chattanooga Times illustrated its front page article with a front page picture of petitioner with Osborn.

About the same time, both papers published editorials of condemnation directed against petitioner. One charged there had been jury fixing in the Test Fleet trial as well as in other criminal trials of petitioner, and directed attention to the approaching trial of this case.

On November 22, the same Osborn story was repeated on the front page of the Times. The next day, the Times carried a story on the impending grand jury probe of Osborn, asserting that Osborn had used the same middleman, one Vick, in attempted jury tampering in this case as well as the Test Fleet case. The Times informed the public that Vick was under heavy guard of United States Marshals. Vick was employed as an investigator by Osborn, and while so employed, reported secretly on Osborn's doings to the F.B.I. (Petitioner's motion for hearing, continuance,

or other relief, filed January 13, 1964, Exhibit A and additional Exhibit A).

Additional stories about the Osborn grand jury investigation were prominently carried on November 27 and 28, and December 2, 3, 4, 5, and 6. The public of the Chattanooga area was thus informed of: The broadening of the investigation to include others besides Osborn; the summoning before the Grand Jury of the foreman of the Test Fleet jury; and the placement of the Grand Jury under heavy guard. A front-page story in the Times on December 6 reminded the public of past trials of petitioner and connected those trials with the forthcoming trial. On December 7, when Osborn was indicted, the Chattanooga News-Free Press published a front page article that Osborn was indicted on three counts, including two for jury tampering in the Test Fleet case, and one count for jury tampering in this case. The article referred to the fact that twelve persons, including petitioner, had been indicted for jury tampering in the Test Fleet trial. The publicity associated petitioner with Osborn, with the disbarment of still another attorney (Beard) on December 19, and connected the issues in this proceeding with unrelated charges against petitioner in other proceedings. This publicity continued on an almost daily basis to the very day this trial opened on January 20; and indeed through the voir dire of prospective petit jurors. (Id. Exhibit A; see p. 24, *infra*). In short, when fairly read, the publicity which the Court found prevented a fair trial in Nashville was substantially identical with the publicity in Chattanooga, except that the latter was closer to trial time. (See Appendix D, *infra,* p. 63a). The substance of all newspaper articles was broadcast over the radio and television.

Judge Wilson denied petitioner all relief whether by way of continuance, hearing to determine the necessity for continuance, or other relief. On December 28, 1963, Judge Wilson had found the publicity prejudicial to fair trial. Less than three weeks later, Judge Wilson thought the publicity "so long ago as not to be material," and that adverse publicity on "matters unrelated to the issues of this lawsuit" was irrelevant to fair trial because "otherwise, no public figure could be tried until he ceased to be a public figure." On that basis, and without noting the items in petitioner's showing of prejudicial publicity, Judge Wilson found that, prior to transfer, "the proceedings in this case received summary treatment in the local news media," and, after transfer, "the coverage has related almost wholly to the pre-trial procedures and the trial preparations, free of prejudicial content." Further, Judge Wilson stated that "the extent of the influence, if any, of the publicity complained of upon prospective jurors can best be determined by the Court at the time of the voir dire examination". He concluded that petitioner had failed in his burden of showing a *prima facie* case for holding a hearing on his motion for a continuance or other relief. (I D.A. 224a-226a).

The voir dire examination showed the effects of the publicity. All of the sixty-four veniremen, with one uncertain exception,[6] had read, seen, or heard all or

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[6] The uncertain exception was Mrs. Key. On voir dire conducted by Judge Wilson she was asked: "To what extent have you read any publicity or news accounts or seen television accounts or any other source of information about this trial." Mrs. Key may have answered that question when she responded: "I just don't know anything about it. I really don't." The question was not pursued further. Tr. 1109.

part of the publicity concerning petitioner.[7] Some of them stated that they had not gone beyond headlines. Eighteen of the sixty-four prospective jurors admitted to having an opinion on the case requiring some evidence for its removal. These eighteen were excused for cause.[8] With Judge Wilson conducting the voir dire of most of them, the remaining forty-five prospective jurors simply denied the forming of any opinion and stated they would be impartial. The matter not being pursued in depth, they remained unexcused for cause. All defendants exhausted their peremptory challenges (Tr. 1390), which the Court, over defense objection, had limited to a collective total of ten. (II D.A. 547a-549a). Eleven of the twelve petit jurors (and the four alternate jurors) finally sworn had been bathed in the stream of prejudicial publicity preceding petitioner's trial.[9]

The prejudicial publicity continued during the voir dire and selection of petit jurors, which began on January 20, 1964 (Tr. 104). On January 22, the Chattanooga Times published a story, starting on the front page, on the picking of the petit jury, entitled "Jury

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[7] Tr. 252; 323; 364; 386; 397-398; 466-467; 479; 523; 538; 543; 561; 569; 570; 577; 584; 646; 661; 669; 676; 683; 688; 699-700; 707-708; 715; 722-723; 731; 737; 827; 836-838; 854-855; 862; 871-872; 877; 884; 897; 906; 915; 923; 931; 1005; 1006; 1039-1040; 1061; 1079-1080; 1087; 1096; 1102; 1117; 1124; 1130-1131; 1139; 1145; 1151-1152; 1157; 1163-1164; 1249; 1256; 1280; 1281; 1285-1286; 1290-1291; 1297; 1304; 1310; 1323-1324; 1329.

[8] Tr. 325; 539; 543; 551; 552; 582; 649; 827; 854-856; 1005; 1006; 1039-1040; 1043; 1047; 1249; 1256-1257; 1280; 1281; 1286; 1305; 1323-1324.

[9] Mrs. Key, the one prospective juror who might not have been so bathed, see p. 23, fn. 6, *supra*, became a petit juror, Tr. 1224.

prospects now number six." In the column adjacent to the continuation of that story, the Chattanooga Times had another story entitled: "Senate probe witness says Hoffa told of keeping two sets of books." This article, datelined Washington, D. C., quoted Don B. Reynolds, a witness in the Baker investigation conducted by the Senate Rules Committee, as saying that when he, Reynolds, "wanted out" of a real estate deal financed by a Teamster Fund, petitioner had assured him "they [the McClellan Committee] will never see your name" because "I have got two sets of books." (II D.A. 510a-511a; Petitioner's Exhibit 6). This was called to the attention of the Court, and motion for continuance was renewed to no avail (II D.A. 511a-513a). The next day, January 23, the Chattanooga Times published a story with respect to this trial, starting on the front page and entitled "Judge Questions Jury Prospects." In the column adjacent to the continuation of that story, the Times rehashed the story of petitioner's keeping two sets of books; and added that the transcript of Reynold's testimony had been referred to Senator McClellan who, in turn, informed a reporter that this information was of interest to the Senate Investigation Subcommittee in connection with its investigation of petitioner. This article was called to the attention of the Court; and petitioner's motion for a continuance was again renewed and again denied. (II D.A. 520a-521a; petitioner's Exhibit 9).

Further, Judge Wilson's attendance at a farewell party for an F.B.I. agent on or about January 17, was related in stories on January 17 by both Chattanooga daily newspapers. The Times on that day carried a picture of Judge Wilson in the company of the retiring F.B.I. agent as well as other agents. F.B.I. agents

were in charge of the investigation of this case and expected to testify. These articles were called to Judge Wilson's attention on January 22, 1964. Motion for a continuance was again denied. (Tr. 748-750; Parks Exhibits 7 and 8).

The Court of Appeals ruled that there was no abuse of discretion in the denial of a continuance. In doing so, the Court paraphrased the statements of Judge Wilson, including "some of it [the publicity concerning petitioner] did not relate to the issues of the case"; took no note of any precedents, although petitioner had cited pertinent decisions of this Court (see pp. 56ff, *infra*); and said nothing concerning the denial of a hearing requested by petitioner to determine the necessity for continuance or other relief. (Appendix A, *infra,* p. 281a).

(b) *Heavy Guard of Marshals Attending Upon Jury.* The Government had a large guard of Marshals at the trial. (II D.A. 543a). As many as 16 or 20 Marshals were in charge of the jury at one time (II D.A. 544a). Marshals guarded each door to the courtroom with as many as ten present in the courtroom on occasions (II D.A. 447a). Even before the jury was selected Marshals attended the jurymen during the lunch hour (II D.A. 476a), and to their homes; and more Marshals guarded them at night than there were jurors (II D.A. 486a). The newspapers, radio and television, before the jury was sequestered, stressed the fact that the jury panel was being guarded by twenty Marshals (II D.A. 526a-527a, 570a). When the panel left for lunch, it was surrounded by Marshals who prevented them from proceeding through the hallways in the normal manner, by directing and herding

them (II D.A. 543a). After a week of trial, the Court finally entered an order that the number of Marshals attending the jury at one time be reduced to four (II D.A. 571a). However, the Government itself admitted that 59 Marshals from various places in the country participated at one time or another in attending the jury during its sequestration. Petitioner repeatedly objected to the number of Marshals about the courtroom and in attendance on the jury (I D.A. 30a; II D.A. 447a, 543a; III D.A. 1411a; IV D.A. 1810a).

The Government's chief witness Partin was attended by a Marshal while he testified; and the Marshal in the presence of the jury grabbed his arm and led him from the courtroom when he left the stand (III D.A. 1222a, 1411a). A Marshal accompanied almost all Government witnesses who came in and out of the courtroom (III D.A. 1413a). Jurymen called to decide a charge of jury tampering were inevitably affected and prejudiced against petitioner by the heavy guard of Marshals. A juryman stated that the guard of Marshals meant "that it did happen once"; and that "the problem lay in not enough security another time and that in order to prevent the same thing recurring, that they have made some guards here" (II D.A. 505a). Another juryman knew he "was protected from somebody," and "felt happy about" that protection. (II D.A. 486a). Still another juryman observed that "you can't look one way or the other unless the Marshal is right behind you." (II D.A. 533a).

At the beginning of the trial, Deputy Marshal Disspayne, who had assisted in the investigation of

this case for the Government (II D.A. 665a), was one of the Deputy Marshals in charge of the jury (II D.A. 636a). Because he had referred to petitioner and his associates as "Hoffa and his hoods," he was removed by the Court (II D.A. 572a, 636a); but his assistants and associates remained in charge of the jury. The jury was sequestered and attended by Marshals throughout the trial (II D.A. 474a).

The Court of Appeals saw no connection between the heavy guard of Marshals attending upon the jury and the fairness of petitioner's trial (Appendix A, *infra*, p. 29a).

3. Deprivation of Fair Trial—by surveillance activity of the government in and about the place of trial and defense headquarters which surveillance was so extensive as to deny the petitioner the effective assistance of counsel.

As early as the pretrial conference, and repeatedly during the trial, petitioner, his co-defendants, and their counsel complained that they were being hampered by an extensive surveillance conducted by the Government in and about defense headquarters and the place of trial (III D.A. 1497a-1498a; IV D.A. 1778a-1785a, 1809a-1813a).

Defense counsel repeatedly moved the Court for an order forbidding surveillance, or for a hearing thereon (III D.A. 1499a; IV D.A. 1778a-1784a).

Finally, after submission of the case to the jury, the Court held an evidentiary hearing on the Government's surveillance of defendants and their counsel (VII D.A. 3212a-3566a).

On hearing, the following undisputed facts were disclosed:

No less than 25 special agents of the Federal Bureau of Investigation were assembled in Chattanooga to conduct the Government surveillance in connection with the trial (G.A. 371b, Aff. of Ingram; VII D.A. 3258a).

The surveillance took place during the periods January 16 through 23, 1964, and February 3 through 6, 1964 (VII D.A. 3258a, 3272a, 3289a). Selection of the jury commenced on January 20, 1964 (VII D.A. 3264a).

The surveillance during the first period (January 16-23) was, according to the Government, for the alleged purpose of observing four Teamster officials who would be associated with petitioner (G.A. 371b; I D.A. 336a).

Before starting on their work, the FBI agents conducting the surveillance were furnished with photographs of petitioner, his co-defendants and their counsel "so that they would know what these gentlemen looked like." (VII D.A. 3308a).

One of the four Teamsters officials whom the Government alleged was the object of surveillance shared the same hotel suite with petitioner during the trial and lived in his Detroit home (VII D.A. 3351a).

With respect to another of the Teamster officials whom the Government alleged to be an object of surveillance, "there was" according to the FBI "reason to believe that he might be" seen in the presence of petitioner, and he was so seen (VII D.A. 3402a).

During the course of the surveillance petitioner was observed and his movements were reported on various

occasions (VII D.A. 3257a, 3260a, 3261a, 3384a-3387a, 3402a, 3403a).

During the surveillance, the FBI communicated with each other by radio (VII D.A. 3287a, 3306a-3307a). These communications reported movements and activities of certain defendants and their counsel (VII D.A. 3319a; G.A. 367b, et seq., Affs. of FBI agents Barrett, Sanders, McGivney, Reilly, Welborn, Cook, Riley, Cole, Hudson, Stout, Sheets, Hawkins, Pollard).

From posts in the T.V.A. and two adjacent buildings, the surveillance was focused with particular intensity on defense headquarters and on the Federal Court House, a short block away (VII D.A. 3312a-3313a). The FBI knew that defendants and defendants' counsel were staying at the Patten Hotel (VII D.A. 3325a), and from their vantage points they had a good view of the hotel (VII D.A. 3325a). The minute petitioner arrived in Chattanooga for the trial, the FBI knew he would be staying at the Patten Hotel (VII D.A. 3403a-3404a). An agent immediately went there and observed him as he entered the hotel (VII D.A. 3402a-3404a).

In eight days, from January 16 through 23, 1964, the FBI took a total of 723 photographs in the area of the Patten Hotel and the Federal Court House (VII D.A. 3261a, 3272a). Petitioner was photographed 14 times (VII D.A. 3261a), co-defendant Dorfman 15 times (VII D.A. 3261a), co-defendant Parks 5 or 6 times (VII D.A. 3261a-3262a), co-defendant King 10 times, and defense counsel Kossman 8 or 10 times while in the presence of co-defendant King (VII D.A. 3262a), co-defendant Campbell 6 or 7 times (VII D.A. 3262a), defense counsel Haggerty 10 or 12 times (VII D.A. 3263a), defense counsel Branstetter 5 or 6 times (VII D.A. 3261a), defense counsel Harry and Marvin

Berke a total of 8 to 10 times (VII D.A. 3261a), defense counsel Silets 4 times (VII D.A. 3261a), defense counsel Bufalino 8 or 10 times (VII D.A. 3262a), and defense counsel Brown, Alexander and Grady 2 to 3 times each (VII D.A. 3262a).

The surveillance during the second period (February 3 through 6, 1964) centered on Bernard Spindel, an electronics expert who was employed by the defense to investigate whether and to what extent the Government was conducting a surveillance. (G.A. 371b-373b Ingram Aff., VII D.A. 3289a). Since he was known to be staying at the Patten Hotel, FBI agents kept it under continuous surveillance (G.A. 373b; Ingram Aff.). Spindel was also observed in the company of defendants and their counsel (G.A. 375b, 406b, 379b, 380b; Hawkins, Barrett and Sheets Affs.). The Government claimed that all of the foregoing activities constituted "observation" and not "surveillance" of defendants and their counsel.

Spindel monitored the radio communications between FBI agents concerning movements of defendants and their counsel (VII D.A. 3314a-3315a, 3433a). Early in his investigation, Spindel stated to one of the defense counsel that his report was positive regarding Government surveillance and that he would seal and submit his findings to the Court (VII D.A. 3422a).

The record is replete with proof of the effect of the Government's surveillance upon petitioner's right to effective assistance of counsel. As a result of the surveillance, so extensive as to be apparent to them, defense counsel could not sit in a conference with their clients and feel secure. They were constantly in apprehension of being followed and their communications overheard (IV D.A. 1778a-1785a, 1809a-1813a).

Specific instances were set forth in which conferences with their clients had to be postponed or cancelled because of the fear created by the surveillance (VII D.A. 3529-3532a; IV D.A. 1779a-1784a). Defense witnesses were frightened (IV D.A. 1811a, 1812a).

The distracting fears of defendants and their counsel were not lessened by the discovery during the trial that in the Test Fleet case the Government had secret informer Partin in the midst of defense councils (*supra,* pp. 10ff).

The Government denied *direct* surveillance of the defendants and their counsel. The trial court thought its belief in the truth of that denial sufficient to dispose of the question of the impairing effect of the Government's admitted surveillance on petitioner's right to effective assistance of counsel (I D.A. 335a-336a). The Court of Appeals agreed (Appendix A, *infra,* p. 27a).

4. Deprivation of Fair Trial—by the erroneous reception and retention of highly prejudicial evidence, including transcript of the trial judge's statement in the Test Fleet case, in support of the counts on which petitioner was convicted, and without according him the right of confrontation and cross-examination.

Count two of the indictment charged petitioner with aiding and abetting one Medlin in offering a bribe of Ten Thousand Dollars to prospective petit juror, Tippens, in the Test Fleet case. (I D.A. 68a-69a). Medlin was not on trial.

The prosecution started its case with the testimony of the Clerk of the District Court in Nashville. He testified that the Test Fleet trial court had announced it had excused prospective juror Tippens from jury duty. (II D.A. 588a-589a).

Tippens was sworn for the purpose of testifying to Medlin's offer of a bribe to him out of the presence of petitioner or any other defendant. The trial court rejected this proffered testimony on the ground that "before any statement of Mr. Medlin, who is not a party to this action, should be received, . . . there should be some showing in the record of agency or conspiracy that would in some manner involve one or more of the party defendants in the case." (II D.A. 606a-607a).

Thereafter, Partin testified to alleged incriminatory statements made by petitioner when alone with him.

Near the close of its case-in-chief, the prosecution reoffered Tippens as a witness. Tippens testified that at the time of jury voir dire examination he had a conversation with Medlin which he reported the next day to Judge Miller. Tippens did not mention petitioner in this testimony. The trial judge then instructed the jury that Tippens' testimony "would be considered as to the defendant Mr. Hoffa only" to the extent that it might or might not tend to corroborate the witness Partin as to any alleged statements made to Partin by the defendant. (IV D.A. 1926a-1927a). Overruling petitioner's objections the trial judge stated "the Court has given to the jury what it believes to be the proper instruction." (IV D.A. 1927a-1928a).

When Tippens was asked to state his report to Judge Miller, the trial judge limited Tippens' response to his reporting of the fact and not the content of his conversation with Medlin. (IV D.A. 1930a-1931a). Although so instructed, Tippens testified: "I told Judge Miller that I felt disqualified to serve on the jury due to the fact that I had been offered a sum of money." On the motion of petitioner's counsel to

strike and to instruct the jury to disregard Tippens' answer because it gave the content of the Medlin conversation, the trial judge ordered the answer stricken, but gave no instruction to the jury (IV D.A. 1934a). The trial judge overruled objection to the question "did you state anything to Judge Miller about whether or not there had been any offer made"; but sustained the objection when Tippens answered "Yes" to a rephrasing of the same question to "did you say anything to Judge Miller about whether or not any sum of money had been offered to you." (IV D.A. 1935a). Motion for mistrial because of prejudice was denied. (IV D.A. 1935a, 1937a).

The prosecution then ended its case-in-chief with the authentication by court reporter Albert J. Gasdor, and admission over objection of the transcript of Judge Miller's report of the Tippens report to him of the Medlin bribe offer to Tippens. Judge Miller's report of the Tippens report to him was read to the jury. It recounted Medlin's bribe offer of Ten Thousand Dollars to Tippens in all detail. According to the transcript, Judge Miller said that Tippens told him that a neighbor of Tippens told Tippens that Tippens could "pick up $10,000 in $100 bills" in connection with his "being a prospective juror in the case." (IV D.A. 1962a, 1964a).

The trial judge acquitted petitioner on Count Two, the Tippens-Medlin count, because "the evidence of any connection of the defendant, James R. Hoffa, with the matters charged in the second count of the indictment is insufficient to warrant submitting the said second count unto the jury." Before and after the acquittal petitioner moved unsuccessfully to strike the testi-

mony concerning Count Two. (I D.A. 243a; I D.A. 43a; I D.A. 55a; Tr. 5264-5265, 5281; I D.A. 56a; Tr. 8211-8212, 8215).

The prosecutor began his summation with the argument that Judge Miller had initiated the proceeding; and that Judge Miller had informed petitioner of the report by Tippens of the Medlin bribe offer of Ten Thousand Dollars. He then read the verbatim transcript of Judge Miller's report of Tippens' report to him. (VII D.A. 3111a-3115a). The prosecutor argued these matters, not as corroboration of Partin's testimony, but as substantial proof of petitioner's guilt. After first overruling petitioner's objection to this use of the transcript, the Court subsequently reminded the jury of its restrictive use to corroboration of Partin. (VII D.A. 3113a, 3115a).

In his charge to the jury, the trial judge refused to inform the jury of his acquittal of petitioner on the Tippens-Medlin Count Two, but informed the jury instead that Count Two is "not for trial at this time." (VII D.A. 3138a, 3179a; 3205a).

The Court of Appeals found that the trial court had permitted the reading to the jury of the Judge Miller transcript "as a court record." Further, the Court ruled Tippens should have been permitted to testify to the content of the conversation in which Medlin made his bribe offer. Such testimony, it held, was admissible on Count Two to prove that Medlin had made a bribe offer, and also to corroborate Partin. Therefore, since the trial court had erroneously limited the testimony of Tippens, the limited Tippens testimony and the Judge Miller transcript were less than the prosecution was entitled to present. So the Court

below held there was no error in admitting the testimony. Although the point was urged, the Court took no note of the effect of petitioner's Count Two acquittal on the retention in evidence of any testimony concerning the Medlin-Tippens offer of a bribe. (Appendix A, *infra,* pp. 29a-31a).

5. The Grand Jury selection. (a) (b) Suggestor system.

Petitioner filed a timely motion to dismiss the indictment on the ground that the Grand Jury was illegally impanelled (I D.A. 75a-77a). He alleged that the Jury Commission illegally delegated its duty to select names for the jury box to non-official "suggestors," who did not represent a fair cross-section of the community, resulting in the exclusion of cognizable groups of the community from the jury box, the juror venire, and the Grand Jury. The motion was supported by an investigative analysis of the suggestors, the juror venire and the Grand Jury. This showed that all but seven of the ninety-one suggestors were banks, bankers, postmasters, and local State Court officials. (I D.A. 84a-85a). None was a blue collar wage earner, manual laborer, or representative of organized labor.

The venire of one hundred persons included only one person who had ever been a labor union member, four Negroes, two Catholics, and one Jew. There were no current labor union members or blue collar wage earners. The Grand Jury selected therefrom was all white, Protestant, non-union, and none of them was of the manual labor class (I D.A. 76a, 77a-159a). Petitioner requested a hearing and offered to prove the foregoing facts. (I D.A. 77a, 78a).

It was admitted that the Jury Commission sent out a batch of form letters to a group of non-official per-

sons known as "suggestors" (I D.A. 160a-161a), requesting the recipients to supply names of jurors "which will be a fair cross-section of the entire population of your community" (I D.A. 162a-163a). Ninety-one "suggestors" responded (I D.A. 79a-83a), and submitted a total of about 365 names. The Jury Commission placed the names so received into the jury box, neither investigating the persons named nor submitting questionnaires to them. The Jury Commission did nothing whatever to determine whether the persons whose names were submitted by the suggestors constituted a valid cross-section of the community, whether the instructions to the suggestors had been complied with, or whether the persons whose names were submitted were qualified. (I D.A. 161a-165a). The Clerk justified this delegation of official duty by the statement that "it has been my experience that the suggestors I and Mr. Climer pick do return only the names of qualified persons and can be relied upon to do so." (I D.A. 161a).

The Jury Commissioner and Clerk made no effort to judge whether a cross-section had been obtained. They added 15 to 20 names of other persons and placed them in the box with the 365 "suggested" names. The grand jury venire of 100 was selected at random therefrom. (I D.A. 161a, 165a).

The Court ordered argument on "whether a sufficient showing has been made to authorize an inquiry whether the manner in which the suggestor system was used in selecting the present grand jury was such as to invalidate the indictment," and ruled that "no testimonial evidence" could be received on the issue "without a preliminary showing that a material factual

issue has been raised requiring resolution." (I D.A. 166a-167a).

Petitioner made a written offer of proof. As to the delegation of the duties of the Jury Commission to the suggestors, petitioner offered to prove that the Commission did not: (1) make any determination of the qualifications of the prospective jurors obtained from the suggestors; (2) obtain any information from the suggestors other than the names and addresses of prospective jurors; and (3) gave no assistance and made no suggestions to the suggestors as to sources for obtaining a fair cross-section (I D.A. 155a-156a). As to the allegation that the Jury Commission used a restricted class of suggestors "for the purpose of systematically excluding cognizable elements of the community," petitioner offered to prove that: (1) the suggestors used were biased and prejudiced against Negroes, Catholics, Jews, and manual or blue collar workers, and no suggestor knowingly sent in the name of any member of a labor organization; (2) Postmasters as political appointees are biased and the Acting Postmasters, since they are awaiting final appointment, are especially biased and prejudiced in favor of the U. S. Government; and (3) no suggestor, although so requested, selected a fair cross-section. (I D.A. 156a-159a).

Petitioner subpoenaed and produced the Clerk, the Jury Commissioner, and seventy-seven of the suggestors. (I D.A. 377a-411a). The Court refused to receive their testimony.[10] The motion to dismiss the

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[10] The Court permitted examination of the Clerk limited to whether he had known that the one Jew on the venire was the client of petitioner's counsel. (I D. A. 413a). The Clerk testified that he could not recall ever before placing the name of a

indictment was denied. The Court ruled that "no foundation" for such reception of evidence had been laid and that "the one hundred names show in and of themselves that there was no systematic exclusion of any cohesive group in the community." (I D.A. 171a-181a; 419a-420a).

The Court of Appeals approved the District Court's refusal to receive petitioner's proffered proof. On the issue of illegal delegation of duties, the Court of Appeals relied on *Scales* v. *United States,* 367 U.S. 203, as approving the suggestor system. Without benefit of evidentiary hearing, the Court of Appeals further relied on its own factual findings that "the purpose of using suggestors was to obtain an impartial jury drawn from the names of persons representing a cross-section of the community"; and that: "The Clerk and Jury Commissioner remained in control. They reviewed the lists and placed additional names in the box." (Appendix A, infra, pp. 9a-10a).

On the issue of systematic exclusion of cognizable groups in the community, the Court relied on *Glasser* v. *United States,* 315 U.S. 60, 87, for the proposition that "the evidence must be more than mere statements of counsel of what they hope they will be able to prove." (Appendix A, infra, p. 11a). On the basis of the Court's construction of those two opinions, it found

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Jew in the jury box, or ever receiving the name of a Jew from a suggestor (I D. A. 417a). Petitioner's counsel agreed with the judge's statement that the Clerk would testify, as he had in a related case, that he had made "no other specific investigation" of prospective jurors obtained from suggestors, other than to inform the suggestors as to jury qualifications, and to eliminate and supplement the names obtained from suggestors solely for the purposes of allocation among the counties in the District (I D. A. 402a-404a).

the offer of proof of complete delegation and prejudiced selection insufficient to warrant reception of the evidence proffered by the petitioner, because his counsel had not given "the names of witnesses and what their testimony would be in support of the charges contained in the motion," but had only stated "that the proof would come from the testimony of the Clerk, the Jury Commissioner and the seventy-seven suggestors" on hand. (Appendix A, infra, p. 8a).[11]

Finally, the Court recognized petitioner's showing of the disproportion of Negroes and Catholics on the jury venire as against their numbers in the population. But the Court affirmed the denial of a hearing because the jury venire had at least some member or members from each group claimed to have been systematically excluded, and "it is not required that there be a proportionate representation in the grand jury panel of all classes and religions." (Appendix A, infra, p. 11a). However, petitioner had urged the disproportion as warranting an evidentiary hearing on the issue of systematic exclusion.

(c) The Grand Jury voir dire.

For years immediately preceding his indictment here, petitioner was the subject of extensive, continuous, and prejudicial publicity, nationally, and

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[11] The Court below also stated that "defense counsel had talked to only one suggestor at the time." Appendix A, infra, p. 8a. This, in context, had reference to petitioner's counsel, and was not true even as to him. He had talked with several suggestors. (I D. A. 396a, 401a). The record is silent as to other bases for the offer of proof derived from petitioner's trial counsel, other counsel for petitioner, counsel for co-defendants who had joined in the motion and offer of proof, investigators for any of them, and other sources.

locally in the Middle District of Tennessee. In the four months before the impanelling of the Grand Jury, including the period when the suggestors were choosing the names for the jury box, the local publicity, particularly, was intensified. Such intensification of prejudicial publicity in the area centered on the trial of petitioner in the Test Fleet case out of which arose the present charges of jury tampering, and the extraordinary public announcement by the trial judge in that case of receipt of evidence supporting those charges and the impanelling of a special Grand Jury to investigate them.[12] (I.D.A. 166a, 204a)

In convening petitioner's Grand Jury, the District Judge assumed that many members of the venire had been reached by the publicity. As the District Judge put it (I.D.A. 204a):

> "Many of you have no doubt read in the newspapers or heard on the radio that there is to be a special grand jury to investigate a particular matter. This is not strictly accurate. There is no provision in the federal statutes for a special grand jury . . . But in one sense, the jury selected here this morning will be a special grand jury. It is no secret that the decision to impanel a second grand jury this term resulted from reports that improper efforts had been made to influence the verdict of a petit jury in a *highly publicized criminal case* recently tried before the chief judge of this court." (Emphasis supplied.)

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[12] The publicity is documented in the record. See supra, p. 17 ff. Were it necessary this Court could judicially notice the fact that seldom, if ever, in our history, has any single citizen had to bear the weight of repeated official investigation, prosecution, and attendant loss of good name imposed upon petitioner.

Addressing the 23 members of the venire who became the Grand Jury, the District Judge, without reference to petitioner, asked four routine general questions, on open-mindedness and prejudice. (I.D.A. 206a-207a).

At no time during the voir dire of the Grand Jury, did the District Judge refer to petitioner by name. No prospective juror was asked whether he had read about, heard about, or discussed matters adverse to petitioner. No prospective juror was asked the extent to which his reading, hearing, or discussing of matters adverse to petitioner had resulted in a feeling, predisposition or prejudice against petitioner. No caution on bias and open-mindedness was made specific; everything was kept very general.

The District Judge denied petitioner's motion to dismiss (I.D.A. 12a-13a). In a memorandum opinion (I.D.A. 181a-182a) the District Judge assumed that the prospective jurors had read and would continue to read adverse publicity. The District Judge stated he had charted his course in the Grand Jury voir dire by the three opinions in *Beck* v. *Washington,* 369 U.S. 541. The District Judge observed, "If there is a better [course], some appellate Court must chart it." (I.D.A. 182a).

The Court of Appeals held the voir dire inquiry was sufficient, for "it was not necessary that the Court furnish the jurors with the names of each person who might be investigated and direct specific inquiries as to bias and prejudice against him." (Appendix A, infra, p. 16a).

6. Lack of probable cause for indictment.

Petitioner was convicted on two counts of the indictment. (I.D.A. 64a). It developed during the course of the trial that the only evidence introduced by the Government against the petitioner on either of the two counts was the testimony of Partin. It also developed during the course of Partin's testimony that he had claimed the Fifth Amendment privilege against self-incrimination in his appearance before the Grand Jury. (IV.D.A. 1823a-1824a). Partin had told the Grand Jury nothing. On the basis of this information acquired during the course of the trial, petitioner unsuccessfully moved for a new trial and urged the invalidity of the indictment on the ground: "There was no evidence before the Grand Jury as Partin was admittedly the only witness and refused to testify." (I.D.A. 294a-295a; 64a; 327a-366a). On appeal, the Government countered petitioner's contention of no evidence at all before the Grand Jury with the statement that "the substance of Partin's trial testimony was presented to the Grand Jury by another witness, in the form of hearsay evidence." (Government's Brief below, p. 188) In affirming the conviction, the Court of Appeals relied on *Costello* v. *United States,* 350 U.S. 359, for its decision here that the Government can validly put a citizen to trial on an indictment where its whole case on probable cause consists of a Government agent's version of the alleged knowledge of a person who has himself refused to inform the Grand Jury under claim of Fifth Amendment privilege. (Appendix A, infra, p. 36a).

7. Deprivation of Fair Trial—by jury instructions on conspiracy in a case where conspiracy count was severed on judicial finding of severe prejudice; and by abdication to jury of trial judge function of determining existence of aliunde evidence of conspiracy in admitting declarations of alleged co-conspirators against a non-present alleged conspirator.

A short statement of the facts pertinent to discussion of this point is set forth in the reasons for granting the writ.

8. Deprivation of Fair Trial—prejudicial and improper summation to jury.

(a) Prosecutor's argument that petitioner's guilt may be inferred from his exercise of constitutional right to participate in his own trial and to consult with his counsel.

The prosecution's summation to the jury included the following passages:

> "Now, Hoffa, the Defendant Hoffa here would tell you that he was unaware of what was going on. Yet you have seen Hoffa in this courtroom, the Defendant Hoffa every day for six weeks directing his own counsel in every detail of the case. You have seen him pass questions up to his attorneys. You have seen him review the documents that come in here in evidence. In short, you have seen him in complete control of this case, and you have heard him testify that he was in complete control of the Nashville case. You have heard him testify that he was closeted on many occasions with his attorneys in Nashville, that he was reading every page of the transcript." (Tr. 8282, 8283)
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> * * * *
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> "Now, the Defendant Hoffa's defense was that nothing was going on and he didn't know about it if it was. You have seen him, as I have said, in the courtroom. You have observed him in

charge of all details of this case. You have observed him pass up questions to his attorneys. You have heard him testify that he was closeted with his attorneys in Nashville going over every detail of the case, that he was aware of everything.

"It's strange one would believe too much to see this man in control of this case here and hear that he was in control of his Nashville case to know that he was the one defendant with the motive to discuss the jury, to know that all of his associates were working at this effort, and not to believe that he was aware of and directing what was going on." [sic] (Tr. 8309)

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An objection was made and overruled; and motion for mistrial was denied.

(b) Prosecutor's assertion of personal belief in guilt of petitioner.

In the prosecutor's summation the following occurred:

"Mr. Hooker: I want to say to you now, with all the integrity that I hope I possess, with all of the years that I have been at the bar in Tennessee, that I would under no circumstances ask this or any other jury to convict a group of defendants of a criminal offense unless I honestly believed beyond a reasonable doubt that they were guilty.

"Mr. Schiffer: I object to that statement.

"Mr. Silets: Your Honor—

"Mr. Schiffer: (interposing) Your Honor, it's highly prejudicial, it's illegal, Mr. Hooker knows that he dare not draw on the weight of his official office in this case behind that kind of statement. I move for a mistrial.

"The Court: Overrule the motion. Disregard the argument of counsel in that respect. Let's proceed and stay in the record.

Counsel for all defendants then joined in the motion for a mistrial (VII D.A. 3126a, 3127a).

REASONS FOR GRANTING THE WRIT

1. Deprivation of Fair Trial—by use of evidence obtained surreptitiously through the planting of a secret informer in the councils of petitioner in an earlier trial—all in violation of the Fourth, Fifth and Sixth Amendments.

Important questions of general applicability affecting the administration of criminal justice in the Federal courts, and the application of the Fourth, Fifth and Sixth Amendments as well as this Court's supervisory power, are here presented where the Government in the course of a criminal trial employs a secret agent to infiltrate the defense for the purpose and with the effect of obtaining information for the Government from the defendant and his counsel; and the Government thereafter uses the information acquired by such surreptitious means in subsequent prosecution of the same defendant.

(a) Violation of Sixth Amendment rights by agent of Government spying and reporting on petitioner's defense activities throughout Test Fleet trial.

Admittedly, Partin attended the Test Fleet trial for the purpose of spying on petitioner for the Government during the entire course of such trial. It is undisputed that he did so spy.

Through his deception he enjoyed the full confidence of petitioner. He frequently talked with petitioner, and sought and obtained information on the con-

duct of the trial. He observed defense witnesses and others who met with petitioner and his attorneys. He participated in the interviews of defense witnesses and the preparation of documentary evidence. He heard many conversations of petitioner around defense quarters and at meal hours. He reported the information so obtained to the Government.

Federal Court decisions in circuits other than the Sixth recognize the Sixth Amendment right of a defendant to be free of Government interference with the making of his defense. See *United States* v. *Blue,* 350 F. 2d 267 (C.A. 9) now pending on appeal certified to this Court, and *United States* v. *Brodson,* 241 F. 2d 107 (C.A. 7), cert. den. 354 U.S. 911 (Government action depriving defendant of funds with which to finance his defense); *United States* v. *Heath,* 147 F. Supp. 877 (D.C. Hawaii), appeal dismissed, 260 F. 2d 623 (C.A. 9) (Government action depriving a defendant of a document pertaining to his defense).

The Sixth Amendment guaranties are not limited solely to interference with discussions between the defendant and his counsel. Certainly this is the ruling of *Massiah* v. *United States,* 377 U.S. 201; for there the statement was obtained from the defendant in the absence of his counsel, who, as in this case, "did not even know that he was under interrogation by a government agent." 377 U.S. at p. 206. See also *Escobedo* v. *Illinois,* 378 U.S. 478.

A defendant is as fully aware of his defense as is his counsel. If the government obtains information concerning the defense of the case directly from the defendant, particularly during the very course of the trial, it is just as harmful and as much a violation of,

the Sixth Amendment as where it is obtained from his counsel.

The right to defend oneself when accused is lost if the Government can place a spy within the councils of the defendant himself during the conduct of the trial.

The refusal of the Court below to accord petitioner the Sixth Amendment right of freedom from Government espionage in making his defense presents a substantial question of constitutional law not heretofore decided by this Court.

(b) Violation of Sixth Amendment right by intrusion of Government agent into the petitioner's attorney-client relationship.

The Sixth Amendment afforded petitioner the right while on trial to communicate privately with his counsel, and to have private communication among counsel, without intrusion by the Government. *Coplon* v. *United States,* 191 F. 2d 749 (C.A. D.C.), cert. den. 342 U.S. 926; *Caldwell* v. *United States,* 205 F. 2d 879 (C.A. D.C.).

The record establishes that Partin, with the Government's full knowledge and approval, embarked as an undercover agent for the Government on a wholesale intrusion into the privacy of the attorney-client relationship between petitioner and his attorneys. From the very beginning he eavesdropped on the conversations and spied on the activities of petitioner's attorneys, attempted to ascertain from them details in regard to the defense, sat in on conferences between the attorneys and prospective witnesses, and handled charts and other materials prepared by the attorneys for the trial. Partin reported to Walter Sheridan, a government agent, on a daily basis concerning everything that he saw and heard in the defense camp. Sheri-

dan admitted the receipt of this information and relayed the same to Government trial attorneys.

Plainly the Government directly interfered with petitioner's constitutional right to the effective assistance of counsel in violation of the Sixth Amendment.

Nevertheless, the Court below justified the use of Partin's testimony because he was not called upon to testify as to the actual communications between petitioner and his attorneys, but only as to what petitioner told him in the absence of counsel.

Under the ruling of the Court below Partin's intrusion into the rooms occupied by the defense was lawful when he talked to petitioner in one room, unlawful when he talked to petitioner and his attorneys in another room, and lawful again when Partin and petitioner moved to a corner of the room.

Such a rule, intermittently interrupting petitioner's right to effective assistance of counsel and fragmenting it into minute units of time and place should be reviewed by this Court in the exercise of its supervisory power.

(c) Violation of Sixth Amendment right to counsel by Government informer's obtaining of alleged admissions from petitioner in the absence of his counsel and when official investigation had already begun to focus upon him.

On October 22, 1962, the first day of the Test Fleet trial, Partin gave a detailed report to Sheridan of an alleged statement of petitioner to Partin which purportedly showed petitioner as a participant in a criminal conspiracy to tamper with the jury. (III D.A. 1353a, 1360a). At that point the Government's investigation of jury tampering had begun to focus on petitioner as a particular suspect. Thereafter, Partin,

as a Government agent, on every available opportunity, continued to elicit alleged incriminating admissions from petitioner. Such alleged incriminating admissions were elicited from petitioner by Partin on October 23rd (III D.A. 1361a, 1364a), October 25th (III D.A. 1366a, 1369a), October 30th (III D.A. 1382a) and November 7th (III D.A. 1393a-1394a). The holding of the Court below which found no error in the trial court's refusal to suppress these alleged incriminating admissions fails to observe and apply this Court's decisions in *Massiah* v. *United States,* 377 U.S. 201 and *Escobedo* v. *Illinois,* 378 U.S. 478. These decisions teach that a Government secret agent cannot, in the absence of counsel, validly obtain admissions from "a particular suspect" upon whom the Government's investigation "has begun to focus." *Escobedo* v. *Illinois,* 378 U.S. at 490.

Petitioner was not under indictment as in *Massiah* nor under arrest as in *Escobedo.* Review is needed here to determine whether indictment or arrest is prerequisite to protection of the right to counsel.

As we understand *Escobedo* and *Massiah,* the surreptitious obtaining of an incriminating statement from an unsuspecting suspect after focus is the sole prerequisite for protection of the right to counsel. Where, as here, the suspect is totally unaware of an investigation, and the Government seeks to elicit statements from him, it is all the more important that such right be protected. The Government's choice in delaying an arrest or indictment should not be decisive in determining the time when right to counsel attaches; for otherwise the right would exist only when the Government chooses to give it vitality, a power which is nowhere conferred upon the Government.

(d) Violation of Fourth, Fifth and Sixth Amendment rights by unlawful invasion of petitioner's private living quarters and defense headquarters through fraud and deception.

Partin obtained admission to petitioner's living and defense quarters by deception and fraud in pretending to be his friend rather than revealing he was a Government agent. The holding below that this physical intrusion into a constitutionally protected area did not violate petitioner's Fourth Amendment rights conflicts with *Caldwell* v. *United States,* 205 F. 2d 879, 881 (C.A. D.C.); and raises the Fourth Amendment question left open by *Massiah* v. *United States,* 377 U.S. 201 at 204.

(e) The interplay of the Fourth, Fifth & Sixth Amendments.

The facts of this case concerning the Government's method of obtaining alleged incriminating admissions by deception provide a singular opportunity for the Court's analysis and refinement of the "interplay" among the Fourth, Fifth and Sixth Amendments. See *Caldwell* v. *United States, supra; Coplon* v. *United States, supra; Boyd* v. *United States,* 116 U.S. 616; *Mapp* v. *Ohio,* 367 U.S. 643, 656-657, 662; *Gouled* v. *United States,* 255 U.S. 298, 306; *Frank* v. *Maryland,* 359 U.S. 360, 376 (dissent); *Griswold* v. *Connecticut,* 381 U.S. 479, 484-485; *Estes* v. *Texas,* 381 U.S. 532.

(f) All of the evidence obtained in violation of defendant's constitutional rights should have been suppressed.

The Court below held that Partin's testimony of alleged incriminating statements by petitioner was not to be suppressed even if obtained in violation of petitioner's constitutional rights because, as the Court stated, the invasion of such rights, if any, occurred in,

and tainted only the earlier *Test Fleet* case, and not this proceeding.

So far as this holding is applicable to Partin's fraudulent intrusion in violation of the Fourth Amendment, the Court below has misconstrued *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385, 392, and *Wong Sun* v. *United States,* 371 U.S. 471, 484.

Silverthorne and *Wong Sun* demonstrate the firmly settled rule that the fruits of a search in violation of the Fourth Amendment may not be used as evidence in any case.

With respect to the violation of petitioner's Sixth Amendment rights, as set forth above, the holding of the Court below presents the question whether evidence obtained in violation of a defendant's right to counsel in one prosecution can be used in another prosecution. This question has not been decided by this Court nor by any other Federal Court other than the Court below.

Yet, in closely related areas, this Court has invariably adhered to the rule that the Government may not profit by its wrong, whether the wrong be a violation of the Fourth Amendment,[13] or the Fourteenth Amendment,[14] or a Federal statute,[15] or the Federal Rules of Criminal Procedure.[16]

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[13] *Silverthorne* and *Wong Sun, supra.*

[14] *Elkins* v. *United States,* 364 U.S. 206, 215; *Mapp* v. *Ohio,* 367 U.S. 643.

[15] *Nardone* v. *United States,* 302 U.S. 379.

[16] *Mallory* v. *United States,* 354 U.S. 449; *McNabb* v. *United States,* 318 U.S. 332.

2. Deprivation of Fair Trial—by prejudicial Publicity and by heavy guard of marshals attending upon jury.

Seldom, if ever, has any individual been so thoroughly publicized and scandalized by Government and the press over such a long period of time as has petitioner. To fail to take judicial notice of his notoriety would be to ignore matters of general knowledge so universally known that they cannot reasonably be the subject of dispute.

Merely to state James R. Hoffa's name is to evoke the recollection of repeated Congressional investigations and nationally televised public hearings;[17] official

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[17] *Joint Hearings H. Res. 115 Before Special Subcommittees of Joint Committee on Government Operations and House Committee on Education and Labor,* 83d Cong., 1st Sess. 444 (1954).

Hearings on H. Res. 115 Before Special Subcommittee of the House Committee on Education and Labor, 83d Cong., 1st Sess. 502 (1954).

Hearings on S. Res. 74 and 221 Before the Select Senate Committee on Improper Activities in the Labor-Management Field, 85th Cong., 1st Sess. pts. 13, 14, at 4927-5764 (1957). [Ten separate appearances in four days.]

Hearings on S. Res. 74 and 221 Before the Select Senate Committee on Improper Activities in the Labor-Management Field, 85th Cong., 2nd Sess. pts. 36-40, at 13275-15362 (1958). [Sixteen separate appearances in ten days.]

Hearings on S. Res. 74 and 221 Before the Select Senate Committee on Improper Activities in the Labor-Management Field, 86th Cong., 1st Sess. pts. 43, 54-56, at 15947-16204, 18789-19848 (1959). [Nine separate appearances in two days.]

Government reports and releases;[18] and news items, headlines, feature stories, editorials, pictures, caricatures, cartoons and jokes in all mass media, the great preponderance of which were, at a minimum, non-flattering, and, usually, accusatory and villifying.[19] Only the most prominent and publicized of public

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[18] *Staff report of Special Subcommittee of Joint Committee on Government Operations and House Committee on Education and Labor, 83d Cong., 2d Sess., Investigation of Racketeering, Detroit Area* 14 (Comm. Print 1954).

Staff report of Special Subcommittee of House Committee on Education and Labor, 83d Cong., 2d Sess., Investigation of Welfare Funds and Racketeering 13 (Comm. Print 1954).

S. Rep. No. 1417, 85th Cong., 2d Sess. 462 (1958).

S. Rep. No. 620, 86th Cong., 1st Sess. 6 (1959).

S. Rep. No. 621, 86th Cong., 1st Sess. 687 (1959).

S. Rep. No. 1139, 86th Cong., 2d Sess. 883 (1960).

S. Rep. No. 1734, 84th Cong., 2d Sess. 365 (1956).

[19] For Example: The New York Times Index from January 1, 1957 to May 9, 1963 (date of instant Indictment), shows a total of 675 news items and approximately 48 pictures, illustrations, cartoons or feature stories relating to petitioner. An additional 51 articles and 5 illustrations appeared between the date of indictment and the start of the trial on January 20, 1964.

The Reader's Guide to Periodical Literature, Volumes 21, 22, 23 and 24 lists a total of 205 articles or news items, often accompanied by pictures, in such magazines of national and popular distribution as Life, Time, Look, Business Week, U. S. News and World Report, Newsweek, Saturday Evening Post, Reader's Digest, Fortune, New Republic and Reporter for the period March, 1957 to May 9, 1963. Between May 9 and January 20, 1964, an additional 29 articles appeared.

Particularly pertinent is an article appearing in the May 21, 1963 issue of Look magazine, which reached the public two weeks after the current indictment, captioned "Jury Tampering in Tennessee," in which the government's case against petitioner was set forth in great detail.

officials and entertainment personalities are as familiar to the public as is your petitioner.

Any theme—stated, stressed, repeated—voiced by every form of mass media, cannot help but create an image in the public mind. The constant reiteration of that theme by television, radio and the press saturates the public mind until it becomes a preconception against which all new information is classified, compared, and evaluated.

A public image of guilt is as easily created as any other image; when the mass media's theme is one of intrinsic evil[20] the result is a preconception of guilt which is so widespread that it is a proper subject of judicial notice, for it has become "what everyone knows and uses in the ordinary process of reasoning about everyday affairs." Morgan, Judicial Notice, 57 Harv. L. Rev. 269 (1944), at 272. See *Dennis* v. *United States,* 339 U.S. 162, 182, (Justice Frankfurter dissenting).

This petition poses, among other issues, the basic constitutional question of whether any person so adversely exposed over a period of so many years to

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[20] In connection with the McClellan Committee it has been observed:

> "By the time Hoffa had completed the first of his numerous appearances before the committee, millions of TV screens and newspaper photos had made him so notorious that even the crews on the planes he flew would leave the cockpit to stare at him, fascinated by the aura of evil strength that had been projected around him."

Jacobs, Extracurricular Activities of the McClellan Committee, 51 Calif. L. Rev. 296, 299 (1963).

the public eye and ear can receive a fair trial, not because of such past adverse exposure, but because just prior to the trial such exposure is being constantly refreshed and refocused by agencies and officers of the federal government and all media of mass communication.

The goal of the Sixth Amendment is a "jury capable of taking in, free of prepossessions, evidence submitted in open court," and to avoid a trial when the "minds" of "fallible men and women before they enter the jury box," are "saturated by press and radio for months preceding by matter designed to establish the guilt of the accused." *Irvin* v. *Dowd,* 366 U.S. 717, 729, 730 (Frankfurter, J., concurring). Because such fairness is so difficult to attain "the Court [does] not stop to consider the actual effect of the practice, but [strikes] down the conviction on the ground that prejudice [is] inherent in it." *Estes* v. *Texas, supra.* Thus, the question is not whether there is a juror who was so clearly biased that even he acknowledges that fact, but whether "it would be difficult to say that each [juror] could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man." *Irvin* v. *Dowd, supra,* at 727; See also, *Delaney* v. *United States,* 199 F. 2d 107 (C.A. 1).[21]

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[21] Publicity before and at the time of the trial creates problems apart from prejudice; jurors and witnesses have often reacted peculiarly when aware of the presence of an audience created by the mass media. *Estes* v. *Texas, supra,* Douglas, *The Public Trial and The Free Press,* 33 Rocky Mt. L. Rev. 1 (1960).

When the adverse derogatory publicity has been so "extensive and intensive" over so great a period of time that, in the very nature of things, those exposed to it cannot resist a predisposition antagonistic to the defendant, then the preconditions for a fair and impartial trial have been seriously compromised. See, e.g., *Beck* v. *Washington,* 369 U.S. 541, 557; LeWine, *What Constitutes Prejudicial Publicity in Pending Cases,* 51 A.B. A. Jour. 942 (Oct. 1965). *A fortiori,* when, in addition to the general circumstances nurturing such predisposition, the particular geographic area from which the jurors are to be chosen is, during the period immediately preceding the trial, exposed to an even more intensive saturation of hostile, derogatory, debasing and guilt-suggesting publicity, then, as a matter of law, a fair and impartial trial is not possible.

The point is not that persons who have achieved notoriety cannot get a fair trial, but that the impact of pre-trial publicity as to such persons must be weighed more carefully in applying the constitutional standard.

Indeed, the publicity in the instant case (it is reviewed in comprehensive detail at pp. 17-26, 53-54, *supra*), presents a stronger case than that which moved the court in *Marshall* v. *United States,* 360 U.S. 310, to exercise its supervisory power over the federal judiciary's administration of the criminal law. In *Marshall* and here the prejudicial publicity included items which were legally unrelated, but factually close to the charge on which the defendant had been convicted. Here, petitioner was charged with aiding and abetting attempts at jury tampering. Much of the publicity in question identified petitioner with Attorney Z. T. Osborn, theretofore one of his counsel, in

newspaper accounts of Osborn's disbarment for attempted jury tampering in this proceeding, of Osborn's indictment for such jury tampering, and of the Grand Jury investigation of Osborn and others for jury tampering other than the charges here, but in connection with the same petit jury. *Marshall* and this case involved prejudicial publicity which implied past crimes, legally and factually unrelated to the charges. At or near the time of this trial there were public releases by the Department of Justice, and by Senate Committees, of myriad accusations made against petitioner by indictment, and by official innuendo, including charges of fraud, embezzlement, misappropriation of funds, etc.

The nature and extent of the publicity in Nashville was so intense and pervasive that it compelled a finding by the court of prejudice so severe as to make a fair trial impossible. But substantially the same publicity which made a fair trial impossible in Nashville, thus requiring the Trial Judge, some three weeks before trial, to grant a change of venue to Chattanooga, a distance of only 136 miles, was also released in the Chattanooga area. However, the Chattanooga publicity continued past the beginning of the trial and into the petit jury voir dire. See supra, p. 24. Voir dire examination showed that all but one of the petit jury had been reached by the publicity. As in *Marshall,* the petit jurors who had seen the prejudicial publicity denied, on questioning by the Trial Judge, that they would be in any way influenced by it. To this point, *Marshall* and the case at bar are remarkably similar.[22]

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[22] In *Marshall,* although the Court made no point of it, the prejudicial publicity came after impanelling of the petit jury; here the prejudicial publicity started before trial and continued into the voir dire of petit jurors.

The dissimilarities between the two cases show the more serious denial of fair trial in this case. *Marshall* was prejudiced by only two news items. We need not detail again the many, varied, and continuous news accounts, editorials, and feature articles which oppressed petitioner. Although the press alone initiated and was responsible for the prejudice to *Marshall,* the Executive and Legislative branches of the prosecutor, the United States, generated much of the publicity which assailed petitioner. See *Delaney* v. *United States,* 199 F. 2d 107, 114 (C.A. 1); and compare *Irvin* v. *Dowd,* 366 U.S. 717, 725-726. Examples of this are the press releases of the Department of Justice which detailed all its accusations against petitioner (See Appendices E-1 and E-2, *infra,* p. 71a), and the Washington release of items which identified petitioner as fraudulently and criminally keeping "two sets of books" in association with the "Bobby Baker" investigation.

Thus it seems clear that here, even more surely than in *Marshall,* the writ should be granted in the exercise of the Court's supervisory power over the federal court system and in the interest of protecting the right of fair trial under the Sixth Amendment. *Inter alia,* review by the Court would permit consideration, and, perhaps, immediate and authoritative repudiation of two startling doctrines which have been judicially intimated in this proceeding: the Trial Judge's view (see p. 23, *supra*) that a citizen may become so prominent by virtue of adverse publicity that his trial must go on despite prejudice, for otherwise "no public figure could be tried until he ceased to be a public figure"; and the view of the Court of Appeals (see p. 26, *supra*) that adverse publicity connecting a citizen with many crimes is somehow not prejudicial so long as those crimes

are not connected with the issues in the immediate trial. In *Delaney* v. *United States, supra,* the Court, on facts comparable to those here, essentially repudiated both of the foregoing doctrines in better consonance with considerations of due process.

Petitioner's motion for continuance of the trial date for a reasonable period of time should have been granted. Such continuance would have permitted the "cooling off" of the geographic area so recently heavily saturated with hostile publicity and was the only effective relief which could have been granted at that time.

Finally, the Government's placing of a heavy guard of Marshals on the jury completed the prejudice to petitioner's fair trial resulting from the effect of adverse publicity upon the jury. This unnecessary action was fully consistent with the aura of evil and the suggestion of guilt generated by the Government and the press.

Surely, this case requires observance of Mr. Justice Douglas caveat in *Beck* v. *Washington,* 369 U.S. 541, 587, "to make as sure as is humanly possible that one after whom the mob and public passion are in full pursuit is treated fairly . . ."[22a]

[22a]The recent grant of certiorari by this Court in *Sheppard* v. *Maxwell,* Oct. Term 1965, No. 496 demonstrates the continuing interest of this Court in the very serious problem of prejudicial publicity.

3. Deprivation of Fair Trial—by surveillance activity of the Government in and about the place of trial and defense headquarters which was so extensive as to deny the Petitioner the effective assistance of counsel.

The impact of the admitted Government surveillance upon defendants and their counsel had to be substantial. Its inherent tendency was to inject into the proceedings an unsettling influence—one which by its nature instilled in defendants and their counsel constant fear that their footsteps were being dogged, their movements scrutinized, and their confidential communications overheard. Such unsettling influence would necessarily lessen the ability of counsel to exercise that calm and deliberate judgment so essential to effective representation of their clients. At the same time it would lessen the ability of the defendants to give their counsel effective assistance in the preparation of the defense. These inherent tendencies of the Government's admitted surveillance were demonstrated by the proof.

The instant case presents an important question which should be decided by this Court in the light of its past decisions on rights to a fair trial and effective assistance of counsel. So the extent of such rights will be determined and the Government will be correctly guided for the future.

The Court has long recognized that fair trials require freedom from extraneous influences and pressures. *Moore* v. *Dempsey,* 261 U.S. 86, 90-91; *Pennekamp* v. *Florida,* 328 U.S. 331, 334; *Cox* v. *Louisiana,* 379 U.S. 559, 562. Just recently in *Estes* v. *Texas,* 381 U.S. 532, that principle was applied to bar one source of such extraneous influence and pressure—television in the courtroom.

The courts have also jealously guarded against interferences with an accused's right of private consultation with his counsel—the *sine qua non* of effective assistance of counsel. *Glasser* v. *United States,* 315 U.S. 60; *Coplon* v. *United States, supra; Caldwell* v. *United States, supra.*

These two principles face a new challenge here, requiring further definition of fundamental rights. The *Estes* opinion itself points the way to decision:

(a) The Court there declared broadly that "the atmosphere essential to the preservation of a fair trial—the first fundamental of all freedoms—must be maintained at all costs." 381 U.S. at 540. And it held the atmosphere there "was not one of that judicial serenity and calm to which petitioner was entitled." 381 U.S. at 536. That serenity and calm was destroyed in *Estes* by television in the courtroom. Here it was destroyed by the impact upon defendants and their counsel of the Government's admitted surveillance in the immediate vicinity of the trial. The exertion of such influences near the courtroom rather than in the courtroom does not save them from illegality, where, as here, the impact fell upon petitioner, the co-defendants and their counsel in the trial itself. *Cf. Cox* v. *Louisiana,* 379 U.S. 559, 562; *Tribune Review Pub. Co.* v. *Thomas,* 153 F. Supp. 486 (W.D., Pa.), *aff'd.* 254 F. 2d 883 (C.A. 3).

(b) *Estes* condemned the influence of television which to the defendant is "a form of mental—if not physical—harassment, resembling a police line-up or the third degree." Such an influence "might well transgress his personal sensibilities, his dignity, and

his ability to concentrate on the proceedings before him—sometimes the difference between life and death—dispassionately, freely, and without the distraction of wide public *surveillance.*" 381 U.S. at 549 (emphasis added).

The Government's admitted surveillance necessarily subjected defendants and their counsel in this case to the same physical and mental harassment, the same affront to their personal sensibilities and dignity. That surveillance necessarily has this effect on jurors was pointed out years ago in *Sinclair* v. *United States,* 279 U.S. 749, 765:

> "The most exemplary resent having their footsteps dogged by private detectives. . . . The mere suspicion that he, his family, and friends are being subjected to surveillance by such persons is enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration."

The necessity for calm judgment by defendants and their counsel is no less than its necessity for jurors.

(c) *Estes* noted that the condemned influence tended to deprive the accused of effective assistance of counsel because of its intrusion into the confidential attorney-client relationship. 381 U.S. at 549. So here, both the natural tendency and the actual effect of the admitted surveillance was to weaken the effectiveness of counsel because of the fears and apprehensions generated by the surveillance.

(d) Finally, *Estes* pointed out that a governmental procedure may "involve such a probability that prejudice will result that it is deemed inherently lacking in due process," even though the influence of such pro-

cedure is so intangible as to defy detection by a defendant or control by a judge. 381 U.S. at 542-543. The impact upon petitioner and his counsel of the Government's admitted surveillance was intangible and not subject to precise measurement. Nevertheless, at a minimum, its undeniable tendency and actual effect was to create a strong probability of prejudice to the effective conducting of the trial defense.

The intrusion-upon-counsel cases further point the way to decision in this case. *Coplon* v. *United States, supra,* condemned intrusion by Government interception of telephone communications between the accused and her attorney. *Caldwell* v. *United States, supra,* condemned intrusion by the Government planting of an informer in the midst of the defendants and their counsel. *Glasser* v. *United States, supra,* established that *any* interference with the effectiveness of counsel voids a conviction—the court will not "indulge in nice calculations as to the amount of prejudice. . ." 315 U.S. at 75.

The fear and apprehension generated by the Government's surveillance in the present case, making it impossible for petitioner and his counsel to consult effectively, was no less an intrusion and interference than in *Coplon* and *Caldwell.*

The degree of demonstrable prejudice is far greater here than in either *Coplon* or *Caldwell,* where the defendants were totally unaware of the Government's activities until after trial.

Whether the surveillance of defendants and their counsel was direct or indirect is immaterial. It is the impact of the surveillance upon them which is the controlling consideration. "The reasonable tendency of the

acts done is the proper criterion." *Sinclair* v. *United States,* 279 U.S. at 764 ("Shadowing" of a jury established interference with it regardless of lack of actual contact). "The fact that the intrusion was unintentional does not remove the effect of the intrusion." *Gold* v. *United States,* 352 U.S. 985. Nor is the effect removed by the fact that it may have resulted from acts directed to another purpose. *United States* v. *Denno,* 221 F. 2d 626, 631 (C.A. 2) (concurring opinion of Frank, J.) cert. den. 349 U.S. 968.

The impact of the surveillance here was the same as it would have been had it been admittedly directed specifically and purposively toward defendants and their counsel. A central question for decision here is whether, as the Court below indicates, defendants and their counsel while at trial may reasonably be expected to remain calm and unimpeded, because the Government surveillance is not admitted by the Government to be directed specifically against them.

4. Deprivation of Fair Trial—by the erroneous reception and retention of highly prejudicial evidence, including transcript of trial judge's hearsay statement in Test Fleet case, in support of the counts on which petitioner was convicted and without according him the right of confrontation and cross-examination.

Count Two charged petitioner with aiding and abetting in the offering by Medlin of a bribe to prospective petit juror, Tippens. The prosecution's testimony on this Count was compendious and came at the beginning and the end of the prosecution's case. The attention of the jury was particularly drawn to this line of evidence by Tippens' two trips to the stand, and the many colloquies in the presence of the jury concerned with the admissibility of Tippens' testimony and Judge Miller's transcript. The transcript of Judge Miller's

report of the Tippens report to him of the Medlin bribe offer to Tippens was read to the jury and emphasized in the prosecutor's argument to the jury. The connection in the jury's mind of this line of evidence with petitioner was specifically made and repeated when the trial judge, at the beginning and end of the case, instructed the jury that it "would be considered as to the defendant, Mr. Hoffa only" in possible corroboration of Partin. See p. 33, *supra*. The prosecution's case against petitioner on any count was weak at best as it rested essentially upon this line of evidence and Partin's testimony of petitioner's alleged statements made to him alone. Here, as in *Krulewitch* v. *United States*, 336 U.S. 440, 445, "we cannot say" that the admission of Tippens' testimony and the Judge Miller transcript, or their retention in evidence after petitioner's acquittal on Count Two, "may not have been the weight that tipped the scales against petitioner."

The Court of Appeals found no error in the admission of the Judge Miller transcript because, as it held in its main ruling on the matter, Tippens should have been permitted to testify to the content as well as the fact of Medlin's bribe statements to him.

The elements of the offense charged against petitioner by Count Two were basically two: (1) the making of a bribe offer to Tippens by Medlin and (2) petitioner's aiding and abetting of Medlin. The Sixth Amendment gives petitioner the right of confrontation and cross-examination in connection with "the witnesses against him." The carving out by the Court below of an exception to the Sixth Amendment right of confrontation and cross-examination, when Government proof is offered to prove the principal crime against an alleged aider and abettor finds support in

Colosacco v. *United States,* 196 F. 2d 165 (C.A. 10) and *United States* v. *Hartwell,* Fed. Cas. No. 15318 (C.C.D. Mass.), but is in conflict with the decision of the Seventh Circuit Court of Appeals in *United States* v. *Browne,* 225 F. 2d 751.

This Court has not passed upon the validity of the precise exception to the Sixth Amendment made by the Court below. But the making of that exception presents an important question of constitutional law which should be decided in the light of *Krulewitch* v. *United States,* 336 U.S. 440; and see too, *Douglas* v. *Alabama,* 380 U.S. 415. In *Krulewitch,* a conspiracy case based on the "same principle" as a case of aiding and abetting (see *Pinkerton* v. *United States,* 328 U.S. 640, 647), the Court refused on any theory to widen Sixth Amendment exceptions so as to permit hearsay evidence of a co-conspirator's statement made after the completion of the conspiracy. Here, too, this Court should consider the theory of the Court below which created a new exception to the Sixth Amendment expressly because the prosecution could not otherwise prove Medlin's offer to Tippens, and expressly because Tippens' testimony of what Medlin said to him somehow becomes direct evidence and not hearsay since it is the "corpus delicti" of the principal crime charged in Count Two against petitioner.

Since it was on the basis of this theory of the Court below that it approved the admission of the Judge Miller transcript, to the prejudice of petitioner, it is respectfully submitted that its ruling should be reviewed here.

The Judge Miller transcript, constituting a prior judicial determination of the existence of jury tampering,

was a devastating piece of evidence in the trial. The trial court did not permit Tippens to testify to the conversation; but the introduction of the transcript of the proceedings before Judge Miller was even more prejudicial than if Tippens had been permitted directly to testify about his conversation with Medlin. For not only was cross-examination of both Tippens and Judge Miller precluded in that manner, but also there was conveyed to the jury Judge Miller's judicial finding that there was in fact an attempt to tamper with a juror, a finding which was implicit in his excusing juror Tippens from further service.

In this form, it constituted highly prejudicial, twice removed hearsay, coupled with the even more prejudicial judicial determination by a district court, on the basis of such hearsay, that there had been an attempt to tamper with juror Tippens, and that Tippens should therefore be excluded from the jury.

This Court has recently held that the transcript of the testimony of the prosecuting witness at a preliminary hearing, not then subjected to cross-examination, could not be introduced at the trial in a state court (*Pointer* v. *Texas,* 380 U.S. 400). The court held that the introduction of such a transcript in a Federal criminal case clearly would deny the accused's right of confrontation under the Sixth Amendment. Similarly, in *Douglas* v. *Alabama,* 380 U.S. 415, this Court reversed a conviction because the prosecutor called a convicted accomplice to testify, and after the witness refused to testify, read the accomplice's confession into the record. The ruling of the Court below essentially conflicts with these decisions.

The Court below, as a further holding, approved the admission of the Tippens testimony and the Judge

Miller transcript for the purpose of the possible corroboration of Partin. The Court did so without consideration of the value of such evidence to the prosecution as against the prejudice to petitioner. The value of the evidence to the prosecution for purposes of corroboration of Partin was minimal. Since the Medlin bribe offer to Tippens, and Judge Miller's excusing of Tippens from jury service on that account, became known to the public following the Nashville trial, (IV D.A. 1907a), Partin could easily have learned of these matters long before he testified in this proceeding. The prejudice to petitioner on all counts from the admission of this evidence of a bribe offer to a juryman in a criminal case against petitioner was great. See pp. 30ff *supra*. In this aspect, the decision of the Court below is in conflict with *Hale* v. *United States*, 25 F. 2d 430 (C.C.A. 8), and *Marko* v. *United States*, 314 F. 2d 595 (C.A. 5), where, in fairly comparable circumstances of great prejudice to the defendant and little value to the prosecution for a non-hearsay purpose, the admission of evidence indicating the commission of a related crime by the defendant was held prejudicial error.

Finally, the affirmance by the Court below of petitioner's conviction on Counts Three and Five presents the important question of criminal law not yet decided by this Court whether evidence of a crime upon which a defendant has been acquitted (the Count Two line of evidence here) can be retained in evidence for any purpose after such acquittal and in aid of his conviction for other and related crimes (Counts Three and Five here). Compare *State* v. *Little*, 87 Ariz. 295, 350 P. 2d 756, with *People* v. *Griffin*, 60 Cal. 2d 182, 383 P. 2d 342.

5. The Grand Jury selection.

(a) (b) Suggestor system as here employed.

The duties of the Clerk of Court and Jury Commissioner under the federal statutes governing jury selection (28 U.S.C. Sec. 1861, et seq.) are to select jurors who are qualified and to select them from a cross-section of the community so that a jury is truly representative. These duties of the Clerk and Jury Commissioner on jury selection cannot legally be delegated.[22] Here, the Court of Appeals held petitioner not entitled to show by the testimony of the Clerk and Jury Commissioner that, as the record already indicated, they performed no duties at all with respect to over ninety (90%) percent of the names in the jury box from which the grand jury was drawn, other than to accept such names from suggestors and place them in the box—without checking their qualifications and without exercising any judgment as to cross-section. Indeed, the Commission was without any information (just name and address) on which to determine qualifications or the representative nature of the names placed in the jury box.

The Court's reliance in this connection on *Scales* v. *United States,* 367 U.S. 203, 257, misconstrues that decision. In *Scales,* the Clerk and Jury Commissioner checked on the prospective grand jurors obtained from

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[22] *Glasser* v. *United States,* 315 U.S. 60, 85; *Beatrice Foods Co.* v. *United States,* 312 F. 2d 29, 35 (C.A. 8), cert. den. 360 U.S. 936; *Wilson* v. *United States,* 104 F. 2d 81, 82 (C.A. 5), cert. den. 308 U.S. 574; *Thiel* v. *Southern Pac. Co.,* 67 F. Supp. 934, 942, aff'd 149 F. 2d 783 (C.A. 9) rev'd on other grounds 328 U.S. 217; *Dow* v. *Carnegie-Illinois Steel Corp.,* 100 F. Supp. 494, 498 (W.D. Pa.), rev'd on other grounds, sub nom, *Dow* v. *U. S. Steel Corp.,* 195 F. 2d 478 (C.A. 3); *In re Petition for Special Grand Jury,* 50 F. 2d 973 (M.D. Pa.); *United States* v. *Murphy,* 224 F. 554, 564 (N.D.N.Y.).

suggestors by requiring such prospective grand jurors to complete an information questionnaire, and by personal inspection of such questionnaires. There was no such precaution here.

The holding of the Court below conflicts with the rationale of the Court of Appeals for the Fifth Circuit in deciding *Wilson* v. *United States,* 104 F. 2d 81, cert. den. 308 U.S. 574. There, the Clerk and Jury Commissioner required each person whose name had been submitted by a suggestor to complete a questionnaire showing full name and address, age, occupation, and basis, if any, for release from jury duty. In rejecting a defense claim of prejudice because of the sending of the questionnaires, the Court held that "it was the duty of the Jury Commissioners to make inquiry before the names of jurors were placed in the box." 104 F. 2d at p. 82. Here, admittedly, neither the Clerk, nor the Jury Commissioner, made any inquiry.

This Court has not passed upon the question of whether the intention of the Congress to commit the selection of qualified and representative jurors to the discretion and judgment of the Clerk of Court and the Jury Commissioner is frustrated by use of a suggestor system in which those officials merely inform suggestors of what they (the Clerk and Jury Commissioner) seek, and blindly accept what the suggestors chose, without any independent check, investigation, or significant review by either the Clerk or Jury Commissioner. The question is an important one of federal law which should be decided by this Court, to effectuate the intent of Congress.

In 1960, the Judicial Conference Committee on the Operation of the Jury System found that a substan-

tial minority of the federal districts do not check the names received from suggestors by questionnaire to, or personal interview with, prospective jurors. 26 F.R.D. 411, 439. Accordingly, the Committee repeatedly recommended that questionnaires should be used in all instances, supplemented by personal interview where possible. 26 F.R.D. at 419, 428, 435, 438, 448, and 471. Such a practice enables the Clerk and Jury Commissioner to exercise non-delegable duties of judgment and discretion committed by the Congress to their care. It is the prevailing practice.[24] The contrary practice herein approved is followed in the Middle District of Tennessee, and in a minority of other federal districts.[25] The minority practice leaves no room for the exercise of judgment and discretion by the Clerk and Jury Commissioner, and supplies no information for the exercise of such judgment and discretion. So long as the minority practice is permitted to continue, the well-settled doctrine of the non-delegable nature of the duties of the Jury Commission is emptied of content and made meaningless in some sections of the country.

Additionally, here, despite petitioner's proffered testimony of the Clerk, the Jury Commissioner and the

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[24] See, for example, *Beatrice Foods Co.* v. *United States*, 312 F. 2d 29 (C.A. 8); *Padgett* v. *Buxton-Smith Mercantile Company*, 283 F. 2d 597 (C.A. 10); *Windom* v. *United States*, 260 F. 2d 384 (C.A. 10); *Scales* v. *United States*, 260 F. 2d 21 (C.A. 4); *Wilson* v. *United States*, 104 F. 2d 81 (C.A. 5); *United States* v. *Romano*, 191 F. Supp. 772 (D.C. Conn.); and *Dow* v. *Carnegie-Illinois Steel Corp.*, 100 F. Supp. 494 (W.D. Pa.).

[25] See, for example, *Walker* v. *United States*, 93 F. 2d 383 (C.A. 8), cert. den. 303 U.S. 644; *United States* v. *Shannabarger*, 19 F. Supp. 975 (W.D. Mo.); and *United States* v. *McClure*, 4 F. Supp. 668 (E.D. Pa.).

suggestors, the District Court refused to permit petitioner to introduce any proof of the systematic exclusion of Negroes, Catholics, Jews, manual or blue-collar workers, and members of organized labor.

Further, the refusal of the Court to hear testimony prevented the petitioner from proving that the suggestors themselves were selected from, and were members of, narrowly restricted classes within the community. The prejudice to fair selection resulting therefrom was increased by the fact that 45 of the 91 suggestors were political appointees of the plaintiff in this prosecution. Cf. *United States* v. *Murphy,* 224 F. 554 (N.D. N.Y.).

In approving such denial of hearing, the decision of the Court below is in conflict with decisions of this Court and the Third Circuit. *Dow* v. *U. S. Steel Corp.,* 195 F. 2d 478 (C.A. 3) holds that the non-particularized assertion by counsel of systematic exclusion of cognizable groups in the community from the jury requires the reception of evidence even though no statement is made as to what evidence will be given by any prospective witness. The requirement of the Court below that petitioner's offer of proof detail the evidence to be offered is also in conflict with *Carter* v. *Texas,* 177 U.S. 442. There, the Court held that the defendant was entitled to present his evidence on systematic exclusion although he had not given "the names of the witnesses whom [he] proposed or intended to call," or stated "their testimony in detail." 177 U.S. at p. 449. The recently decided case of *Coleman* v. *Alabama,* 377 U.S. 129, is in accord.

Finally, the Court below has misapplied *Glasser* v. *United States,* 315 U.S. 60, and *Frazier* v. *United*

States, 335 U.S. 497, upon which it relied. In those decisions there was no tender or offer of proof; here petitioner had his witnesses present to prove systematic exclusion.

To require more would be effectively to destroy petitioner's constitutional right to an impartial grand jury.

Moreover, the court misapplied the *Glasser* standard that "distinct evidence" of discriminatory selection must be introduced or offered before a "full-scale investigation by the court" will be held (Appendix A, infra, pp. 11a, 14a). Petitioner's showing established, by any reasonable analysis, a strong likelihood that the elite group of selectors had produced an elite group of prospective jurors to the virtual exclusion of labor union members, "blue collar" wage earners, Negroes, Catholics and Jews. (*supra,* pp. 36-40). Thus the "distinct evidence" test was satisfied. The court below denied a hearing on the basis of minor "discrepancies" in the showing (Appendix A, infra, pp. 11a-12a). But such "discrepancies" are inevitable in proof compiled without the benefit of the subpoena power and a full hearing. There is thus presented a question important to the administration of justice whether discriminatory selection must be proved to the hilt before a hearing on the subject can be had.

(c) The Grand Jury voir dire.

The District Court explicitly recognized the widely known fact that the grand jury was being convened for the purpose of investigating petitioner and his alleged unlawful activities in the Test Fleet trial. (I D.A. 204a). Nevertheless, at no time during the voir dire of the grand jury did the District Judge refer to the peti-

tioner by name. No prospective juror was asked whether he had read, heard about, or discussed matters adverse to petitioner. No prospective juror was asked the extent to which his reading, hearing, or discussing of matters adverse to petitioner had resulted in a feeling, predisposition or prejudice against petitioner.

The Court of Appeals ruled that "It was not necessary that the Court furnish the jurors with the names of each person who might be investigated and direct specific inquiries as to bias and prejudice against him." This holding is in conflict with the ruling of this Court in *Beck* v. *Washington,* 369 U.S. 541. In *Beck,* a 4 to 3 decision, the majority rejected Beck's contention that he had been denied equal protection by the trial judge's references to the Teamsters while impanelling the grand jury. The opinion of Mr. Justice Clark, joined in by Justices Harlan, Brennan, and Stewart, rejected Beck's contention on the ground that "The complete answer to petitioner's argument is that references to the Teamsters were necessary in the voir dire to eliminate persons who might be prejudiced for or against petitioner and in the instructions to explain the purpose and scope of this special body." *Beck,* at p. 549.

Thus, not only did the trial judge in *Beck* inquire as to whether the jurors were personally prejudiced against Beck, but in addition, this Court held that additional reference to Beck's organization, the Teamsters, was necessary to eliminate prejudiced persons from the grand jury. Here, *a fortiori,* in substantially identical circumstances, involving a President of the Teamsters, much maligned by much publicity, it was necessary for the District Judge to inquire specifically by name as to whether any of the jurors were prejudiced against

petitioner in order to eliminate prejudiced persons from the grand jury. See the dissenting opinions in *Beck* v. *Washington, supra.* The failure of the District Judge to do so—his production, as it were, of "Hamlet" without reference to Hamlet—left any prejudiced juror free to serve on the grand jury with some salving of conscience by way of what the District Judge's generalities on bias and open-mindedness might have reference to.

The three opinions in *Beck* exhibit a disagreement among seven members of the Court on a question of importance in application of the Constitution and supervision of the administration of justice in the federal courts. That question is whether a claim of deprivation of a defendant's right to an unbiased grand jury is sufficiently supported by a showing of procedures unfairly inadequate for obtaining an unbiased grand jury, or whether a showing of actual bias in the grand jury is required. Contrast in *Beck* the opinion of Justice Clark (joined by three justices), 369 U.S. at 545-546, 548-549, to the dissenting opinion by Justice Black (joined by the Chief Justice), 369 U.S. at page 563, and to the dissenting opinion of Justice Douglas, 369 U.S. at p. 579. The question has never been passed upon by a majority of the nine members of the Court. It should be resolved here.

6. Lack of probable cause for indictment.

In *Costello* v. *United States,* 350 U.S. 359, the sole evidence of probable cause before the Grand Jury was a summary by a government agent of testimony and documents clearly available for presentation at trial. In those circumstances, this Court held hearsay evidence alone to be sufficient for valid indictment, and

found no persuasive reasons there advanced for a contrary rule. 350 U.S. at pp. 363-364. Here the question is not just one of whether hearsay evidence alone will support an indictment. Here the only evidence of probable cause for indicting petitioner was a government agent's version of the alleged knowledge of a person who himself refused to testify before the Grand Jury under claim of Fifth Amendment privilege. The decision of the Court of Appeals approves this Governmental practice. No reported decision has ever done so before; and here, unlike *Costello,* there are persuasive reasons for review and condemnation of such practice by this Court in exercise of its supervisory power.

Indictment of a citizen solely upon a hearsay report of the alleged knowledge of a person who says nothing to the Grand Jury upon claim of Fifth Amendment privilege is to indict him upon nothing—except the Government's speculation, of which the Grand Jury was not informed in this case, that the person with the alleged knowledge might change his mind on claiming privilege at the trial,—or, if not, that between indictment and trial something else, not presented to the Grand Jury, might turn up to serve as a substitute. If this be permissible, the basic function of a Grand Jury—to serve as a shield between the citizen and unfounded accusation—is easily blocked by the prosecutor; and Governmental pressures to eliminate the bothersome claim of Fifth Amendment privilege are encouraged.

In this case, as the expression goes, the Government "lucked out," because Partin did at last provide the only evidence at trial connecting petitioner with the

crimes alleged against him. If in another case the Government does not "luck out," a citizen bears the full weight and ignominy of an indictment upon which he cannot be convicted, all as the eventuation of a game of chance and speculation that ill-befits the administration of criminal justice.

This Court should here rule that probable cause for an indictment is not established by hearsay presentation of the alleged knowledge of a witness who has himself refused to testify before the Grand Jury because of Fifth Amendment privilege. Consideration of such a rule can only, of necessity, take place in a case such as this one, where the Government has won its game of chance.

In those cases where the Government does not, citizens suffer indictments that end with acquittal and no occasion is provided for consideration of a remediable rule.

7. Deprivation of Fair Trial—by jury instructions on conspiracy in a case where conspiracy count was severed on judicial finding of severe prejudice; and by abdication to jury of trial judge's function of determining existence of aliunde evidence of conspiracy in admitting declarations of alleged co-conspirators against a non-present alleged conspirator.

The counts on trial, II-V, charged four separate substantive offenses. The Court had ordered severance of Count I, the conspiracy count, on the finding that "there was inherent prejudice to all defendants in the joinder of the conspiracy count." (I D.A. 199a).

When the first material witness testified, the defense objected to hearsay declarations as to co-defendants and requested that the jury be instructed to consider them

only against the maker (II D.A. 610a-611a). The Court, however, instructed the jury at length on the law of conspiracy. This instruction covers more than four pages of the printed record and covers the entire field of the law of conspiracy, the law of hearsay, all exceptions to the hearsay rule, including admissions against interest, declarations of conspirators in furtherance of conspiracy, the requirement that there be proof *aliunde,* and an extensive definition of the crime of conspiracy (II D.A. 611a-615a).[26] The defense specifically objected to the instruction and to the injection of the concept of conspiracy into this trial of substantive offenses (II D.A. 615a-619a).

On the following day, the Court repeated the instruction (II D.A. 639a-645a). The Government suggested that the jury was probably confused and requested instead an instruction on the law of principal and agent (II D.A. 637a-638a), which instruction was given (II D.A. 642a). The conspiracy instructions in a shorter form were repeated many times during the trial (II D.A. 770a, 771a; III D.A. 1352a, 1397a, 1421a, 1442a). The trial court made no preliminary determination of the existence of *aliunde* evidence of conspiracy in admitting declarations of alleged co-conspirators against an alleged non-present conspirator; but left that determination entirely to the jury.

The decision of the Court below found no error in conspiracy instructions, and error but no prejudice in leaving determination of the existence of *aliunde* evidence entirely to the jury. The decision raises two questions of general importance in the administration of Federal criminal justice: (1) In circumstances

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[26] This instruction is attached as Appendix C, *infra,* p. 59a.

where a conspiracy count has been severed on a judicial finding of prejudice, is a defendant deprived of a fair trial by repeated instructions to a jury to apply the law of conspiracy; and (2) Is a defendant deprived of a fair trial when the trial judge abandons entirely to the jury his function of determining the existence of *aliunde* evidence of conspiracy in admitting declarations of alleged co-conspirators against a non-present conspirator. Cf. *Forman* v. *United States,* 361 U.S. 416; *Jackson* v. *Denno,* 378 U.S. 368.

8. Deprivation of Fair Trial—prejudicial and improper summation to jury.

(a) Prosecutor's argument that petitioner's guilt may be inferred from his exercise of constitutional right to participate in his own trial and to consult with his counsel.

The prosecution in its summation to the jury expressly and repeatedly invited the jury to infer guilt on the part of petitioner from the fact that petitioner had actively participated in the conduct of this trial and the Test Fleet trial. The theory pressed by the prosecutor was that petitioner must have directed the alleged efforts by others to tamper with the jury, because in this trial he directed his counsel, passed questions up to them and reviewed the exhibits, and during the Test Fleet trial he "was closeted with his attorneys in Nashville going over every detail of the case . . .". See, *supra,* p. 44.

The constitutional right of a defendant to participate in his trial includes suggesting questions, reviewing exhibits, and conferring with his counsel. This is one of the reasons why the Constitution forbids trials *in absentia.* The theory of the prosecution in this case impairs this constitutional right by making its exercise evidence of guilt.

Adverse comment on the Fifth Amendment right of the accused not to testify vitiates a conviction because it impairs the exercise of that right. *Griffin* v. *California,* 380 U.S. 609; cf. *Grunewald* v. *United States,* 353 U.S. 391. Adverse comment on the participation of a defendant in his trial should be equally impermissible as impairing the exercise of his Sixth Amendment right.

The right of representation by counsel includes, at a minimum, the effective consultation with counsel both within and outside the courtroom. To permit argument to the jury that the vigorous exercise of this right of consultation in the courtroom may be considered as proof of participation in alleged illegal activities is substantially to impair the constitutional right.

(b) Prosecutor's assertion of personal belief in guilt of petitioner.

The prosecutor told the jury:

> ". . . with all the integrity that I hope to possess, with all of the years that I have been at the bar in Tennessee, that I would under no circumstances ask this or any other jury to convict a group of defendants of a criminal offense unless I honestly believed beyond a reasonable doubt that they were guilty." (VII D.A. 3126a).

The Court below held such expression of the prosecutor's belief in the guilt of petitioner to be not improper because it was based "upon the evidence in the case." (Appendix A, *infra,* p. 52a).

This holding is in conflict with *Greenberg* v. *United States,* 280 F. 2d 472 (C.A. 1). The prosecutor's expression of belief in this case went beyond that condemned in *Greenberg.* Here the prosecutor not only

expressed his personal belief in the guilt of the accused, but he assured a Tennessee jury, trying a prominent labor union leader from Detroit, Michigan, that he staked his belief on his integrity as a long-time member of the Tennessee bar and that he believed petitioner guilty beyond a reasonable doubt.

The problem of expression of a prosecutor's belief in the guilt of an accused occurs frequently in the Federal courts. For dicta in accord with the holding in *Greenberg, supra,* see *United States* v. *Sawyer,* 347 F. 2d 372 (C.A. 4); *United States* v. *White,* 324 F. 2d 814, 816 (C.A. 2); *Dunn* v. *United States,* 307 F. 2d 883, 885-6 (C.A. 5); *Orebo* v. *United States,* 293 F. 2d 747, 750 (C.A. 9) cert. den., 368 U.S. 958; *Steele* v. *United States,* 222 F. 2d 628, 631 (C.A. 5).

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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